IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-770

TREADWAY COMPANIES, INC., *et al.*,

Petitioners,

—v.—

BRUNSWICK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners Treadway Companies, Inc., Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc., and Bowl-O-Mat Paramus Operations respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 29, 1975.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at —— F.2d —— and is attached hereto as Appendix A, *infra,* pp. 1a-32a. The opinion of the United States District Court for the District of New Jersey denying respondent's post-trial motions is reported at 364 F. Supp. 316, and is attached hereto as Ap-

pendix B, *infra,* pp. 33a-49a, and the opinion of that court with respect to equitable relief is reported at 389 F. Supp. 996, and is attached hereto as Appendix C, *infra,* pp. 50a-60a.

Jurisdiction

The judgment of the district court, after trial by jury, was entered on May 31, 1973. The judgment of the court of appeals reversing the judgment of the district court, and requiring a new trial of this proceeding, was entered on August 29, 1975. This petition was filed within 90 days after that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Are petitioners entitled to damages under Section 4 of the Clayton Act for a violation of Section 7 of the Clayton Act because of the continuing illegal presence of acquired companies in their competitive markets?

(2) Assuming that petitioners may be entitled to money damages for such violation, did the district court improperly instruct the jury concerning the measure of damages in such a way as to require a new trial?

(3) Is not a private antitrust plaintiff entitled to the injunctive relief of divestiture under Section 16 of the Clayton Act against the illegal market presence of a respondent who has violated Section 7 of that Act by acquiring one of petitioner's horizontal competitors, notwithstanding that the threatened petitioner has survived after respondent's acquisition of that competitor?

(4) Must an order for equitable relief (including divestiture) issued by a district court pursuant to Section 16 of the Clayton Act, on the basis of evidence previously presented to a jury in the same court, be set aside solely on the grounds that the trial judge erroneously instructed the jury on the issues of liability and damages under Sections 7 and 4 of that Act, notwithstanding the recognition by the court of appeals that it was "obliged . . . to review the district court's findings of fact by a different standard"?

(5) Must petitioners re-litigate the question of whether, under Section 7 of the Clayton Act, an acquired company was "engaged in the flow of interstate commerce" pursuant to decision of this Court in *United States* v. *American Building Maintenance Industries,* 95 S. Ct. 2150 (1975), solely on the grounds that this decision was rendered after trial and without regard to the evidence of such engagement as actually presented to the jury?

(6) When the trial record demonstrates that an acquired company would have gone out of business but for its acquisition by respondent, are petitioners' damages resulting from lost profits under the "but for" test measured from the time of the acquisition or from an indeterminate later time based upon the assumption that the acquisition never occurred?

(7) Does a jury's rejection of the "failing company" defense and the requirement that the acquiring company prove that it was the only available buyer for the acquired company represent, as a matter of law, a corollary finding that the acquired company was not effectively and inevitably out of business at the time of its acquisition?

(8) When respondent refuses to rebut petitioners' proof of a range of damages, on the stated grounds that respondent denies liability and that damages are thus academic, does the trial judge err in instructing the jury that if it first finds respondent liable, it must find damages for petitioners within that range as proven by their five expert witnesses, when the trial judge has also properly instructed the jury on its prerogatives and duties as to the credibility of, and mutual corroboration among, such witnesses?

(9) In the face of uncontroverted evidence as to damages accepted by the jury, is it required that the jury be free to speculate on the precise quantum of damages after it has determined that respondent violated Section 7 of the Clayton Act and that petitioners were causally injured thereby?

Statutory Provisions Involved

Section 7 of the Clayton Act, 38 Stat. 731 as amended 64 Stat. 1125, 15 U.S.C. §18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §15, provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §26, provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . .

Section 2 of the Sherman Act, 26 Stat. 209 as amended, 15 U.S.C. §2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Statement of the Case

The district court had jurisdiction of the subject matter of this antitrust action under the Clayton Act (15 U.S.C. §22), the Sherman Act and 28 U.S.C. §1337. Venue lay in the judicial district by virtue of the special venue provisions of the Clayton Act (15 U.S.C. §22).

By their complaint filed June 14, 1966, petitioners Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc., and Bowl-O-Mat Paramus Operations, together with their parent, Treadway Companies, Inc., charged respondent Brunswick Corporation, one of the nation's two largest manufacturers and distributors of bowling equipment, with acquiring and operating bowling centers in Pueblo, Colorado, Poughkeepsie, New York, and Paramus, New Jersey—where petitioners also operated bowling centers—with the effect of substantially lessening competition or tending to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. §18. Their complaint also charged respondent with monopolizing and attempting to monopolize the retail bowling-center markets in those areas where petitioners operated competing centers, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.[1] With these claims, petitioners joined a request for equitable relief restraining respondent from further violation of Section 2 of the Sherman Act and Section 7 of the Clayton Act and also requiring respondent

[1] Petitioners also alleged that they had been coerced into entering into resale price maintenance contracts in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. This claim was, however, later abandoned by petitioners prior to the commencement of the second trial of this case and is not now before this Court. There were other plaintiffs whose claims were denied by the jury. No appeal was taken as to these.

to divest itself of the bowling centers it had acquired in Pueblo, Paramus and Poughkeepsie.

A first trial of this matter resulted in a hung jury on May 5, 1970.[2] On May 11, 1973, after a second extensive trial, a jury returned a verdict in favor of petitioners in the total amount of $7,074,090.00 after trebling, based upon a finding that respondent had violated Section 7 of the Clayton Act by its illegal acquisition of bowling centers in those petitioners' markets.[3] The jury, at the same time, held in favor of respondent on petitioners' claims under Section 2 of the Sherman Act. Judgment was entered in the district court on May 31, 1973.

On September 17, 1973, the district court denied respondent's post-trial motions in all important respects, although petitioner Pueblo Bowl-O-Mat, Inc. consented to a remittitur of $499,050.00, which thus reduced the total award to $6,575,040.00. Judgment later was entered by the district court awarding petitioners $428,468.00 for attorneys' fees and $18,509.32 for costs.

By opinion dated November 15, 1974 and judgment entered on January 9, 1975, the district court enjoined respondent from acquiring any existing bowling centers in the Pueblo, Paramus and Poughkeepsie markets, and required respondent to divest itself of bowling centers previously acquired in those geographic areas.

By order dated February 14, 1975, the court of appeals ordered all appeals in the foregoing matters consolidated.

[2] One juror announced to the court that she alone had voted for respondent (Tr. 4112).

[3] Thus, in this litigation, now 9 years old, petitioners obtained the votes of 17 out of 18 jurors.

By its opinion filed August 29, 1975, the court of appeals held in petitioners' favor in two important respects:

(1) The district court properly found sufficient evidence to go to the jury on the question of whether respondent had violated Section 7 of the Clayton Act as a result of its acquisition and operation of bowling centers competitive with those petitioners in the Pueblo, Paramus and Poughkeepsie markets (11a, 14a); and

(2) The district court properly found that Section 4 of the Clayton Act provides a private remedy for persons injured by a violation of Section 7 of the Clayton Act (19a, 24a).

Notwithstanding those two key holdings, the court of appeals reversed the district court and remanded the case for a third trial because it felt that the district court had improperly instructed the jury as to:

> (a) the test of "engaged in the flow of interstate commerce" under this Court's holding in *United States v. American Building Maintenance Industries*, 95 S.Ct. 2150 (1975) (15a-16a, 24a);
>
> (b) the elements to be considered by the jury in determining whether respondent's acquisitions had substantially lessened competition or tended to create a monopoly in the relevant markets (21a-23a); and
>
> (c) the proper measure of damages suffered by petitioners as a result of respondent Brunswick's acquisition (24a-27a).

As to (c), the court of appeals held that the jury should have been charged that it was required to find that the

bowling centers would have gone out of business except for respondent's illegal presence (25a-26a), and that the trial judge could not grant a directed verdict as to the range within which damages must be found, notwithstanding that such evidence was abundant and uncontroverted (26a-27a).

The court of appeals held as to equitable relief that the district court's order of injunctive relief must be reversed in view of the reversal of the jury verdict (27a-28a), and that the private remedy of divestiture under Section 16 of the Clayton Act is "inappropriate" on this factual record because (30a):

> . . . At this late stage, ten years after the acquisition, divestiture of going, thriving bowling centers to other purchasers will not change the competitive picture. By now the formerly threatened businesses have survived.

REASONS FOR GRANTING THE WRIT

I.

For the first time in the history of enforcement of the antitrust laws, a trial court on a jury verdict awarded money damages to a private plaintiff for violation of Section 7 of the Clayton Act. As a result of the reversal and remand of the judgment, an imperative need exists to resolve several far-reaching questions which, in the language of the court of appeals, are "of first impression nationally," explore "largely virgin antitrust territory," and are created by "the unique interaction among" Sections 7, 4 and 16 of the Clayton Act. Decision on these questions is needed now, rather than later, to provide authoritative guidance from this Court for many lawsuits pending throughout the land in order to prevent the wasteful expenditure of further judicial and private resources in such litigation and in the case at bar which is already nine years old.

The court of appeals acknowledged that its decision of August 29, 1975 had "far-reaching ramifications" (19a) and that the most important of the questions posed were "of first impression nationally," explored "largely virgin antitrust territory," and were created by "the unique interaction among" Sections 7, 4 and 16 of the Clayton Act (6a). We respectfully submit that this quoted language is an urgent plea to this Court authoritatively to resolve those questions in order to prevent perpetuation of erroneous doctrine and to prevent wasteful expenditure of judicial and private resources in this and many other private antitrust lawsuits now pending throughout the nation.

Under the court of appeals' decision, a third trial has been mandated to take place almost 10 years after the filing of the complaint and, without guidance from this Court now, years of appellate process may again follow. If justice delayed is justice denied, society at least should be able to expect that justice will be justly delayed.

According to the court of appeals, this is the first case in which damages have been awarded to a private plaintiff in suing under Section 7, "a major issue of first impression nationally" (6a). The correlative question necessarily must be whether plaintiffs receiving damages covering the past in the normal course of events also should be awarded divestiture to purge the market of future restraint. This issue is hereafter discussed in more detail in terms of widespread conflicts among five circuits, within the ninth circuit and with controlling authorities of this Court (Point II, *infra*). It should be stressed here that the overall effectiveness of private enforcement of Section 7 will be greatly hampered unless and until this Court directs that the remedy of divestiture is entitled to the same great weight and preferred position in private cases as it receives in Government cases.

Because a decade of litigation has nurtured and ripened the critical issues in a manner not likely to be improved upon, petitioners respectfully urge this Court to grant certiorari in order to put these questions to rest once and for all.[4] Petitioners also suggest that an early determi-

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[4] As of July 31, 1973, in addition to some 59 trial days, there had been 14 formal Court hearings. By then plaintiffs' lawyers had spent 8,530 hours on the case, more than 800 exhibits had been marked and approximately 150 had been introduced into evidence. The Court's docket entries covered 26 pages, our 10 volumes of legal files were 15 inches thick and contained over 225 separate Court filings, and our nine volumes of correspondence and memorandum files were 12 inches thick.

nation by this Court may establish significant and comprehensive boundaries critical not only in the instant case, but for other actions which already have arisen and unquestionably will arise in the near future as more private plaintiffs enforce the antitrust laws and, concomitantly, as the number of corporate acquisitions in the nation continues to rise. Statistics of the Administrative Office of the U.S. Courts reflect a steady rise in private antitrust cases in the federal courts from 510 in 1965 to 1,431 in 1975; the *FTC Statistical Report on Mergers and Acquisitions* has documented a marked upward trend in acquisitions from 1,479 in 1963 to 2,876 in 1973.

The major questions raised by this litigation are set forth at pp. 2-4, *supra*. The question of whether the court of appeals misapplied this Court's decision in *United States* v. *American Building Maintenance Industries* is discussed *infra* at Point III, and that relating to the entitlement of a private plaintiff to the relief of divestiture under Section 16 of the Clayton Act against an acquisition in violation of Section 7 of that Act is discussed *infra* at Point II. All of these questions demand early and definitive resolution by this Court in the national interest.

The answers to these questions afforded by the court of appeals in the instant proceeding have resulted in so gross a denial of justice to the petitioners as to require this Court's supervision. Despite its abstract endorsement of the propositions that respondent Brunswick violated Section 7 of the Clayton Act and that such violation was legally compensable under Section 4 of that Act, the court of appeals mandated a new full-scale jury trial for the determination of already established facts. This result, we

respectfully urge, can be remedied only by this Court's intervention to bring about a correct fusion of law and fact.

The court of appeals recognized that the mere presence of respondent as a competitor in its customers' markets was illegal, and that an injured horizontal competitor can recover damages caused by the acquisition (10a-14a, 16a-19a). This holding, however, failed to impel recognition of the damage consequence necessarily flowing from illegal presence in the market.

The court of appeals premised—contrary to all the evidence—that the corporations illegally acquired might have continued in the market whether or not the acquisitions had taken place (25a-26a). This, with great respect, seems to us to constitute so gross a misreading of the trial record as to require remedy by this Court. For—quite simply and obviously—the acquisitions *did* occur, and the illegally acquired companies *did* cease to exist. The proof is unassailable that there were no alternatives left after respondent foreclosed its chattel mortgages on the lanes and pinsetters. Brunswick had, and exercised, the power to foreclose on the debt or forebear at its pleasure. In doing the former, it eliminated all possibility of the later acquired bowling centers existing further in either the debtor's, or in a stranger's hands (App. 1577a-1579a).

In a forty-lane center, replacement would have required a fresh investment of about $700,000.00, a practical impossibility for the debt-ridden proprietor in face of its unpaid debt to Brunswick (Plaintiffs' Trial Ex. 1). This fact was plainly conceded and established through Brunswick's own witnesses. Thus, Milton Rudo, the officer of Brunswick in charge of bowling operations, testified as to the

impact of Brunswick's repossession upon the bowling center affected: "When we decide to repossess and close, that finishes it" (App. 1758a). He said repossession occurred "only when it became absolutely hopeless" (App. 1577a-1579a). The Brunswick-acquired center in Pueblo, Colorado was so completely beyond redemption as to have had a sheriff's notice posted on its doors (App. 881a) because, according to Mr. Rudo, the proprietor had "failed as a business . . ." (App. 1965a). Similar and abundant evidence related to the defunct condition of Brunswick-acquired centers in Poughkeepsie and Paramus (App. 1723a-1725a; 1727a-1729a; 1917a-1924a).

The court of appeals failed to recognize that, at the moment of repossession of title to the equipment and continuously thereafter, there could be no opportunity for the individual proprietor to carry on as an operating entity. There is no contest as to these facts and the record overwhelmingly supports this statement. No third trial is needed to establish these conceded or undeniable facts.

Under the view of the court of appeals, damages are denied by application of an artificial and factually false premise—*i.e.,* that an acquired entity, but for the acquisition, would have survived in the market. The court of appeals does not speak to the proposition that the acquisition itself being unlawful, damages directly causal from the very fact of acquisition must be compensated for under Section 4 of Clayton. In the instant case, as we have seen, the non-continuation of the acquired companies has been conceded but, we submit, the court of appeals has announced a concept which may deter most private enforcement of Section 7. If a plaintiff may not sue for the very act of acquisition

which eliminates the acquired company from the market and illegally places the acquirer in its stead, then all proof of damage causal from the act of acquisition (the necessary prelude to the unlawful presence of an acquiring company) will be submerged and extinguished by the need to prove that the acquired company would otherwise have gone out of business. Although this circumstance has been proven here, it may not lend itself to proof elsewhere. The wrongdoer may now enjoy the fruits of his wrongdoing, beyond the reach of the Clayton Act, and Section 4 will have been amended by judicial rather than legislative action.

To require proof of some unprovable point in future time will allow many a wrongdoer to escape money damages solely because their very wrongdoings made these damages impossible of ascertainment. This is contrary to long-standing antitrust doctrine. *Bigelow* v. *RCA Radio Pictures Inc.,* 327 U.S. 251, 66 S. Ct. 574, *rehearing denied,* 327 U.S. 817, 66 S. Ct. 815 (1946); *North Texas Producers Assn.* v. *Young,* 308 F.2d 235 (5th Cir. 1962); *Darden* v. *Besser,* 1957 Trade Cases ¶68,646 (D. Michi. 1956), *aff'd,* 257 F.2d 285 (6th Cir. 1958); *William H. Rankin* v. *Associated Bill Posters,* 42 F.2d 152 (2d Cir. 1952).

II.

This Court now should resolve the widespread conflict among the circuits on the important issue of whether or not private antitrust plaintiffs have standing to receive a divestiture order.

The decision below raises two situations contemplated by Rule 19(1)(b) of this Court: a court of appeals' decision "in conflict with the decision of another court of appeals on the same matter" and in conflict with "applicable decisions of this Court." The scope of the conflicts actually is much broader because it encompasses not only conflicts among decisions of five different circuits but also sharp internal conflicts within the ninth circuit.

There is on the one hand a solid line of cases which has evolved since 1958, holding that private antitrust plaintiffs have standing to sue for a divestiture order. *Fuchs Sugars & Syrups, Inc.* v. *Amstar Corp.*, 1975-2 Trade Cases ¶60,568 (S.D.N.Y.); *Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 358 F. Supp. 780, 797-98 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *Bay Guardian Co.* v. *Chronicle Publishing Co.*, 340 F. Supp. 76, 81-82 (N.D. Cal. 1972); *Burkhead* v. *Phillips Petroleum Co.*, 308 F. Supp. 120, 126-27 (N.D. Cal. 1970); *McKeon Construction Co.* v. *McClatchey Newspapers*, 1970 Trade Cases ¶73,212 (N.D. Cal. 1969); *Julius M. Ames Co.* v. *Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965); *Bailey's Bakery, Ltd.* v. *Continental Baking Co.*, 235 F. Supp. 705, 717 (D. Hawaii 1964), *aff'd per curiam*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086, 89 S. Ct. 874 (1969); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524, 525 (2d Cir. 1958).

Two other decisions in this line of cases, *International Tel. & Tel. Corp.* v. *General Tel. & Electronics Corp.*, 351 F. Supp. 1153, 1203-11 (D. Hawaii 1972), and *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 348 F. Supp. 606, 614-17 (C.D. Cal. 1972), recently were reversed on the issue by the ninth circuit. *International Tel. & Tel. Corp.* v. *General Tel. & Electronics Corp.*, 518 F.2d 913, 920-26 (9th Cir. 1975).

There is on the other hand a directly conflicting line of cases holding that private antitrust plaintiffs are not entitled to sue for divestiture. This restrictive rule seemingly was placed in limbo after 1962, but it was unexpectedly revived when the ninth circuit handed down its decision in *ITT* on April 25, 1975. *International Tel. & Tel. Corp.* v. *General Tel. & Electronics Corp., supra; Continental Securities Co.* v. *Michigan Cent. R.R.*, 16 F.2d 378, 379-80 (6th Cir. 1926), *cert. denied*, 274 U.S. 741, 47 S. Ct. 587 (1927); *American Commercial Barge Line Co.* v. *Eastern Gas & Fuel Associates*, 204 F. Supp. 451, 453 (S.D. Ohio 1962); *Graves* v. *Cambria Steel Co.*, 298 F. 761 (S.D.N.Y. 1924); *Venner* v. *Pennsylvania Steel Co.*, 250 F. 292 (D. N.J. 1918).

We urge this Court now to resolve the conflict because of the third circuit's holding that although it expressly disagreed with the ninth circuit's view that the "available legislative history" established "that Congress did not intend to create a private divestiture remedy" (29a), *nonetheless*, "[e]ven if such a private remedy is available, it would in our view be inappropriate because less drastic relief will provide sufficient redress" and because "[b]y now the formerly threatened businesses have survived" (30a). Thus

both the third circuit and ninth circuit have reached the same restrictive result via vastly different routes. That result clearly is in conflict with the above-cited cases of the second and fifth circuits and in addition, we submit, a result which blatantly disregards this Court's clear directive in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S. Ct. 1562, 1580 (1969):

> . . . the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. . . . Section 16 should be construed and applied with this purpose in mind, . . .

Among other deficiencies, the third and ninth circuits' decisions totally ignore the key fact that divestiture and dissolution are forms of affirmative injunction worked out by courts of equity to give meaning to Section 4 of the Sherman Act and Section 16 of the Clayton Act. Divestiture derives from court-framed injunctions, and it is not a creature of statute for the Department of Justice or the private treble-damage litigant. It is instead a judicially-created affirmative injunction, and no reason appears why the equity powers of the court are more limited in shaping injunctions in private than in public suits. The ninth circuit was forced to "acknowledge" that in denying divestiture "we withhold from private parties the simplest, easiest and surest form of relief for antitrust violations" (518 F.2d at 925).

The urgency of the need for resolution of this question also is underscored by the fact that the third and ninth circuits' resuscitation of the more restrictive rule creates a direct conflict also with other opinions of this Court de-

cided in context of divestiture. For example, this Court in 1957 categorically rejected an antitrust defendant's argument that Section 7 "is applicable only to the acquisition of stock and not to the holding or subsequent use of the stock," deciding instead in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 596-97, 77 S. Ct. 872, 879 (1957):

> . . . [The argument] misconceives the objective toward which § 7 is directed . . . . Its aim was primarily to arrest apprehended consequences of inter corporate relationships before those relationships could work their evil, which may be *at or any time after the acquisition,* depending upon the circumstances of the particular case. . . . (emphasis added).

Indeed, the district court specifically cited (59a) this Court's rulings that divestiture "is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not out-distanced the government in their unlawful project," *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128, 68 S. Ct. 947, 957 (1948), and that divestiture is "simple, relatively easy to administer, and sure" and a remedy which "should always be in the forefront of a court's mind when a violation of §7 has been found," *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331, 81 S. Ct. 1243, 1252-53 (1961).

Still other decisions of this court also virtually mandate awarding divestiture against violators of Section 7. "Complete divestiture is particularly appropriate where assets or stock acquisitions violate the antitrust laws. . . . Divestiture is a start toward restoring the pre-acquisition situation." *Ford Motor Co.* v. *United States*, 405 U.S. 562,

573, 92 S. Ct. 1142, 1150 (1972). "Divestiture performs several functions, the foremost being the liquidation of the illegally acquired market power." *United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549, 556, 91 S. Ct. 1692, 1697 (1971).

In view of the state of the case law and the facts of record here, it was entirely improper for the court of appeals to have disturbed the ruling of the district court that divestiture was the appropriate remedy. This Court should now review and endorse this forthright statement by the district court (58a-60a):

> In ruling upon the appropriateness of the remedy the Court is influenced by a number of factors. Initially, it recognizes that private enforcement of the antitrust laws is encouraged both by Congress and the courts as an effective and efficient means of achieving governmental policy. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-131 (1969); Hecht Co. v. Bowles, 321 U.S. 321 (1944). A second but no less central factor is the need to restore competitiveness in the market as well as the actual need for relief by plaintiffs.
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> The flexibility, afforded by the aggrandizement of economic power effected through the vertical merger in the instant case, is the actual danger that threatens both the bowling industry and these plaintiffs. This danger can effectively be removed only by rescinding the merger.

III.

Unless this Court grants the petition, the court of appeals' misunderstanding and misapplication of this Court's recent decision in *American Building Maintenance Industries* will spawn judicial error and needless litigation for years to come.

The court of appeals erroneously believed that the mere fact that this Court's decision in *United States* v. *American Building Maintenance Industries*, 95 S. Ct. 2150 (1975) was handed down midstream in the process of appellate review (*i.e.*, on June 24, 1975) was sufficient to provide an additional reason for reversing the trial court and requiring a new trial with specific instructions to the jury shaped around that decision. The court of appeals stated (15a-16a):

> "Had the district court been possessed of perfect foresight, it would have foreseen a major development in §7 law that was just over the horizon. In *United States* v. *American Building Maintenance Industries*, 43 U.S.L.W. 4838 (U.S. June 24, 1975), the Supreme Court considered the jurisdictional reach of §7. It concluded that unlike §§1 and 2 of the Sherman Act, §7 did not encompass the whole of the commerce power. . . . Applying this new standard to the record before us is a problem of no little difficulty. In fact, had the district court granted a motion to dismiss at the close of the plaintiffs' case, on the ground that the new §7 threshold had not been met, we might have been inclined to affirm that decision. *There was, however, some evidence in the record to suggest that at least*

some of the acquired bowling centers may have made purchases of pins, pinsetter parts and perhaps other supplies, directly from Brunswick, rather than from local distributors. Thus, they arguably were engaged 'in the flow of interstate commerce' within the meaning of the new §7 test. We think it would be unjust, given the intervening change in the law, to find that the evidence presented was insufficient to cross the jurisdictional threshold and thus order that the district court dismiss the case. We think it more appropriate, consistent with the way in which we will ultimately dispose of the case, to have the 'in commerce' question relitigated, with the plaintiffs being given an opportunity to satisfy the new and more stringent jurisdictional test. . . ." (emphasis added).

This holding by the court of appeals reflects massive confusion not only in respect of the traditional role of the jury in findings of fact (see *infra*, pp. 27-32), but also as to the meaning and scope of this Court's holdings in *American Building Maintenance Industries*. In that case, this Court was called upon to adjudicate the dual contentions of the Government that (1) the language "engaged in commerce" as used in §7 of the Clayton Act encompasses corporations engaged in intrastate activities that substantially affect interstate commerce, and (2) in any event, the evidence as to the companies whose acquisitions were challenged showed that they were actually engaged "in the flow of interstate commerce."

With respect to the first contention, this Court held that:

"The phrase 'engaged in commerce' as used in §7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." 95 S. Ct. at 2157-2158.

Although the court of appeals appeared to view the above ruling by this Court as a radical departure in the law, citing *Transamerica Corp.* v. *Board of Governors*, 206 F.2d 161 (3rd Cir. 1952), *cert. den.*, 346 U.S. 901 (1953)—which is nowhere mentioned in *American Building Maintenance Industries*—the fact is that this Court perceived the distinction between "engaged in commerce" and "affecting commerce" as a venerable and long-standing one. Thus, this Court asserted that "the phrase 'engaged in commerce' had long since become a term of art, indicating a limited assertion of federal jurisdiction" (95 S. Ct. at 2156). Indeed, this Court cited in support of its position cases and statutes dating back approximately 40 years (95 S. Ct. at 2156), and even examined the legislative history of both the original Clayton Act of 1914 and its amendment of 1950 (95 S. Ct. at 2156-2158).

In short, this Court by its own definition merely clarified old law and did not break the revolutionary ground which the court of appeals assumed it did. This being so, it is important to note that the trial judge in the instant case explicitly instructed the jury that it must find that the acquired companies were "engaged in commerce" and carefully distinguished between the requirements of (a) involvement "in the flow of interstate commerce" and (b) "affecting" interstate commerce (App. 2264a-2265a; 2342a).

Nowhere did the trial judge suggest that the phrase "engaged in commerce" reaches to the fullest scope of Congress' constitutional power to regulate interstate commerce. And, in denying respondent Brunswick's post-trial motions (33a-49a), the trial judge properly held that there was sufficient evidence for the jury to find that the acquired companies were "engaged in commerce." The trial judge's instructions, in short, were fully congruent with this Court's decision in *American Building Maintenance Industries,* and hence it was serious error for the court of appeals to hold that, solely because that case was decided after the trial of this matter, a reversal of the jury's factual findings was required.

But it is in respect of this Court's holding on the Government's second contention—i.e., that in any event the acquired companies in *American Building Maintenance Industries* were "engaged in commerce" even under the narrower test—that the court of appeals committed its most serious blunder. The court of appeals totally misconstrued the nature of the factual record in this case which differs sharply from that presented in *American Building Maintenance Industries.*

As to the latter, this Court, holding that the "Benton companies were *completely insulated* from any *direct* participation in interstate markets or the interstate flow of goods or services" (emphasis added) (95 S. Ct. at 2158), concluded:

> "To be engaged 'in commerce' within the meaning of §7, a corporation must itself be directly engaged in the production, distribution or *acquisition* of goods or services in interstate commerce." (emphasis added) (95 S. Ct. at 2158.)

This Court found the determinative factor to be that:

> . . . although the Benton companies used janitorial equipment and supplies manufactured in large part outside of California, they did not purchase them directly from suppliers located in other States . . . Rather, those products were purchased in intrastate transactions from local distributors. Once again, therefore, the Benton companies were separated from direct participation in interstate commerce by the pricing and other marketing decisions of independent intermediaries. By the time the Benton companies purchased their janitorial supplies, the flow of commerce had ceased . . . (95 S. Ct. at 2159)

The court of appeals completely ignored this Court's distinction between direct and indirect involvement in the flow of commerce, and brushed aside the abundant and uncontroverted evidence presented by petitioners—and accepted by the jury—as to petitioners' direct involvement. The acquired companies were all purchasers or lessees of Brunswick equipment who, by force of their contracts, were required to buy parts and to receive maintenance services from Brunswick. There is no doubt that they did so and that there was a continuing movement of parts going into thousands of dollars a year, salesmen, maintenance personnel and credit transactions in a substantial flow of commerce across state lines. These were not janitors buying an occasional box of cleaning wax from across state lines. Indeed, the court of appeals was at least partially aware of this distinction in asserting that "[t]here was, however, some evidence in the record to suggest that at least some of the acquired bowling centers may have made purchases

of pins, pinsetter parts and perhaps other supplies, directly from Brunswick, rather than from local distributors" and that "[t]hus they arguably were engaged 'in the flow of interstate commerce' " (16a). The court of appeals apparently was totally unaware of the strength and quantum of evidence upon which the jury relied in making its findings of "engaged in commerce". The court of appeals, in a strange upending of logic, held that "it would be unjust, given the intervening change in the law, to find that the evidence presented was *insufficient* to cross the jurisdictional threshold and thus order that the district court dismiss the case" (16a). (emphasis added)

The factual record before the court of appeals was freighted with evidence as to petitioners' "direct participation" in interstate commerce. The Brunswick-acquired corporations in Pueblo, Paramus and Poughkeepsie directly financed, purchased and obtained service on all their heavy bowling equipment through Brunswick's vast out-of-state credit, manufacturing and other facilities, many of them located in Chicago and Skokie, Illinois; Brunswick's ruthless enforcement of its rights under these credit transactions comprised the very means whereby Brunswick accomplished the illegal acquisitions in Pueblo, Paramus and Poughkeepsie; and maintenance, service, replacement of parts, and advertising programs were conducted by Brunswick on a direct and regular interstate basis (App. 120a-125a; 135a; 212a-213a; 1052a; 1181a-1185a; 1415a-8; 1473a-1474a; 1575a-1576a; 1584a-1589a; 1600a; 1635a-1636a; 1688a; 1709a-1716a; 1723a-1728a; 1916a-1924a; 1930a-1950a; 2224a-2226a; 2716a-2717a).

The fact that the two acquired companies in *American Building Maintenance Industries* purchased a mere $140

worth of out-of-state goods over a 16-month period, of itself, shows its total lack of relevance. Here, the operation of a Brunswick-equipped bowling center of 40 lanes requires a total investment of approximately $700,000 for equipment alone (Plaintiff's Trial Ex. 1). Here, the multi-year credit transactions resulting from such purchases by a 40-lane center required payments to Brunswick *each year* of $12,800 for interest and $67,200 for principal, and here these monthly payments spread over a period of years created for the Brunswick centers in Pueblo, Paramus and Poughkeepsie a competitive advantage of $2,000 per lane over Brunswick's customers *e.g.*, the plaintiffs in this case (Plaintiff's Trial Exs. 1, 1A).

IV.

The court of appeals has drastically upset important doctrines of this Court in respect of instructions to the jury and findings of complicated facts, and the prerogatives of jury, trial judge and appellate court. In doing so, it has so seriously departed from the accepted course of judicial proceedings as to require this Court's supervision.

After holding broadly "that there was sufficient evidence here to go to the jury on the theory that Brunswick's entry . . . created the possibility of substantially lessening horizontal retail competition" (11a) and, "illegal presence which causes injury to the business or property of a competitor is compensable under §4" (19a), the court of appeals emasculated its decision by a blatant failure to weigh the factual record supporting the verdict. This, we submit, constitutes reviewable and reversible error as a matter of law.

The error was compounded by the court of appeals' failure to honor the respective prerogatives and responsibilities of the lower court and the jury in regard to that record. The intervention of this Court is essential in order to restore the integrity of those extremely critical prerogatives and responsibilities.

First, the court of appeals stated that the trial judge's instructions relating to the evidence underlying petitioners' Section 2 claim—which stressed the elements of "qualitative substantiality" deemed important by the court of appeals (21a-23a)—could not be considered as properly instructing the jury concerning the factual elements underlying a Section 7 violation. This compartmentalization of the charge is plain error. Indeed, the jury during its deliberations specifically requested the trial judge in writing to clarify "Section 2 of the Sherman Act, Section 7 of the Clayton Act, and can we find in favor of the plaintiff in one center and in favor of the defendant in another center, or must one verdict be applied to all centers?" (App. 2358a). The instructions with which the district court responded made plain the close relationship of the evidence as it relates to Section 2 and Section 7:

> "If you do not find that Brunswick either monopolized the national market or monopolized any of the local markets, or attempted to monopolize any of the local markets, you may still assess damages if you find that Brunswick violated Section 7 of the Clayton Act.
>
> "Brunswick violated Section 7 of that Act if . . . its acquisition[s] . . . had the effect of substantially lessening competition or of tending to create a monopoly" (App. 2331a).

Responding to the note from the jury, the trial judge succinctly summarized the requirements of Section 2 of the Sherman Act and Section 7 of the Clayton Act and, immediately thereafter, summarized the definition of monopoly. The juxtaposition of these instructions clearly pointed the jury toward a joint consideration of *all* the evidence in the record as it relates to both Section 2 and Section 7 (App. 2381a *et seq.*). The jury's note clearly indicates that it was in the process of weighing the totality of the evidence.

Secondly, the court of appeals refused to uphold the jury's findings that the companies acquired by Brunswick were "engaged in interstate commerce," although the court again recognized that "there was . . . some evidence in the record to suggest that at least some of the acquired bowling centers may have made purchases of pins, pinsetter parts, and perhaps other supplies, directly from Brunswick, rather than from local distributors" and "[t]hus they arguably were engaged 'in the flow of interstate commerce' within the meaning of the new §7 test" (16a). But the court of appeals disregarded the record on which the jury relied.

Thirdly, in regard to its holding that the jury should have been instructed that it had to determine whether the acquired companies would have gone out of business but for their acquisition by Brunswick (25a-26a), the court of appeals for a second time ignored its own prior recognition that "[t]hese newly-acquired facilities competed horizontally at the retail level with Treadway facilities and *were kept in business by Brunswick when they otherwise would have failed*" (emphasis added) (9a). The jury obviously

made such a finding in view of the fact that it could not have arrived at its determination of damages without having first concluded that the acquired centers had been effectively put out of business by respondent Brunswick from the moment of their acquisition by Brunswick. The two determinations of fact—damages and cessation of business—are under the proof, inextricably and necessarily bound together. Paradoxically, the court of appeals recognized that "there is evidence from which the jury might have found that the centers would have closed . . ." (27a).

Finally, the court of appeals asserted that the trial judge erred in directing the jury to find damages for petitioners within a certain range. A reading of the trial judge's instructions shows that the charge invalidated by the court of appeals (26a-27a) was preceded by numerous, lengthy and explicit charges to the effect that the jury was the sole judge of the credibility of witnesses (App. 2251a-2257a) and that the jury could find damages only after it had established a violation of the antitrust laws and also the fact of consequent and proximate injury to petitioners (App. 2251a). The trial judge's instructions—concededly a limited directed verdict on the range of the damages—came *only* after comprehensive instructions (1) charging the jury with its responsibility to determine the credibility of, and corroboration among, various expert witnesses (App. 2251a-2257a), (2) pointing out that respondent offered no evidence in rebuttal to petitioners' damage evidence (App. 2327a), and hence (3) implicitly adhering to the doctrine that a directed verdict must issue when no jury can reasonably find certain facts not to exist. And thereafter (App. 2332a), the trial judge further instructed the jury as follows:

> "I must caution you again at this point that you and you alone are the sole judges of the facts. You, as members of this jury, after careful deliberation, after carefully weighing all the evidence and the inferences to be drawn therefrom, have to decide what damages, if any, are to be awarded to the plaintiffs."

The trial judge had virtually no choice but to direct a verdict in this context on the limited issue of the range of damages, for to do otherwise would contravene the established principle that, with respect to the assessment of damages, "mere speculation should not be allowed to do duty for probative facts." *Atlantic Coastline Railroad Co.* v. *Collins*, 235 F.2d 805 (4th Cir.), *cert. denied*, 352 U.S. 942, 77 S. Ct. 265 (1956), *rehearing denied*, 352 U.S. 982, 77 S. Ct. 380 (1957). Where it is clear from the evidence that reasonable men could reach but one rational conclusion, the trial court has no option but to direct a verdict for the party on whose side the overwhelming weight of the evidence falls. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 336 U.S. 525, 78 S. Ct. 893 (1958); *Herron* v. *Southern Pac. Ry. Co.*, 283 U.S. 91, 51 S. Ct. 383 (1931); *Union Pacific Ry.* v. *McDonald*, 152 U.S. 262, 14 Sup. Ct. 619 (1894); *County Comm.* v. *Beale*, 113 U.S. 227, 5 Sup. Ct. 433 (1885); *Leach* v. *Burr*, 188 U.S. 510, 23 Sup. Ct. 393 (1903); *Mihalchak* v. *American Dredging Co.*, 266 F.2d 875 (3rd Cir. 1959); *Gatenby* v. *Altoona Aviation Corporation*, 407 F.2d 443 (3rd Cir. 1968). Read as a whole, as they must be under such long-standing federal doctrine, these instructions were impeccable. It would have been totally arbitrary and unreasonable for the jury to have rejected the truth of the statements offered by the petitioners' five expert witnesses,

each of whom mutually corroborated the others, and against which no contradictory or impeaching evidence was offered. As the trial judge said (46a):

> . . . Reviewing the dollar amounts proposed by both sides was, of course, an impossible task in this case since defendant produced no damage evidence whatsoever. . . . It would be most presumptuous of this Court to assume that they ignored anything and the charge, viewed in its entirety, certainly did not instruct them to do so. It was admittedly difficult to maintain proper balance in the damages portion of the charge, but the source of the difficulty is obvious. Counsel choose the manner in which a case is to be tried, the court instructs on the law as it interprets it and the evidence adduced at the trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted

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November 26, 1975

APPENDICES

APPENDIX A

Opinion of the U. S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-2127, 74-2128 and 75-1152

NBO INDUSTRIES TREADWAY COMPANIES, INC., NATIONAL BOWL-O-MAT CORPORATION, PUEBLO BOWL-O-MAT, INC., BOWL-O-MAT PARAMUS OPERATIONS, HOLIDAY BOWL-O-MAT, INC., SAGINAW BOWL-O-MAT, INC., PARADISE BOWL-O-MAT, INC., MUNCIE BOWL-O-MAT, INC., SKORE LANES BOWL-O-MAT, INC., MINNEAPOLIS BOWL-O-MAT, INC., DES MOINES BOWL-O-MAT, INC., and INDIANAPOLIS BOWL-O-MAT, INC.,

v.

BRUNSWICK CORPORATION, DANIEL LIEBLICH and REUBEN DANKOFF

BRUNSWICK CORPORATION, Appellant in No. 74-2127
PUEBLO BOWL-O-MAT, INC., HOLIDAY BOWL-O-MAT, INC., and BOWL-O-MAT PARAMUS OPERATIONS, Appellants in No. 74-2128
BRUNSWICK CORPORATION, Appellant in No. 75-1152

(D.C. Civil No. 595-66)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted on Briefs April 1, 1975
BEFORE STALEY, GIBBONS and WEIS, *Circuit Judges.*

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OPINION OF THE COURT

(Filed August 29, 1975)

Gibbons, *Circuit Judge.*

I. Introduction

We have before us appeals and cross-appeals from a final judgment entered in a private antitrust case. The following determinations in the district court are being challenged: (1) the finding of a violation of § 7 of the Clayton Act, 15 U.S.C. § 18; (2) the correctness of the trial judge's calculation of attorney fees and costs; and (3) the

propriety of the trial judge's entry of a divestiture order in a private antitrust case.[1]

The complaint in this complicated litigation was filed on June 14, 1966 by Treadway Companies, Inc. (then known as National Bowl-O-Mat Corp.) and ten wholly-owned subsidiaries[2] through which it operated bowling centers throughout the United States. The plaintiffs charged Brunswick Corporation (Brunswick), a manufacturer and distributor of bowling equipment, with: (1) entering into resale price maintenance contracts in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (First Claim); (2) monopolizing and attempting to monopolize the business of operating bowling centers in various markets in which Treadway operated competing centers, thus violating § 2 of the Sherman Act, 15 U.S.C. § 2 (Second Claim); and (3) acquiring and operating bowling centers in the Poughkeepsie, New York, Pueblo, Colorado, and Paramus, New Jersey market areas which had the effect of substantially lessening competition or tending to create a monopoly in violation of § 7 of the Clayton Act, 15 U.S.C. § 18 (Third Claim). During a pre-trial conference held on March 6, 1973, the Sherman Act § 1 claim was abandoned. The § 2 Sherman Act claim and the § 7 Clayton Act claim went to trial. The jury returned a verdict in Brunswick's favor on the Sherman Act claim. No appeal has been taken from this determination. However, the jury found in favor of three of the plaintiffs— Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc., and Bowl-O-Mat Paramus Operations—

1. Many of the issues presented herein were before us in June 1974. We dismissed those appeals because they were taken from orders which were not final. NBO Indus. Treadway Cos. v. Brunswick Corp., 500 F.2d 1400 (3d Cir. 1974) (Nos. 74-1621, 1622); Appeal of Pueblo Bowl-O-Mat, Inc., 500 F.2d 1400 (3d Cir. 1974) (No. 74-1622); Treadway Cos. v. Brunswick Corp., 500 F.2d 1400 (3d Cir. 1974) (No. 73-2010).

2. These subsidiaries were: Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations, Holiday Bowl-O-Mat, Inc., Saginaw Bowl-O-Mat, Inc., Paradise Bowl-O-Mat, Inc., Muncie Bowl-O-Mat, Inc., Skore Lanes Bowl-O-Mat, Inc., Minneapolis Bowl-O-Mat, Inc., Des Moines Bowl-O-Mat, Inc., and Indianapolis Bowl-O-Mat, Inc.

on the § 7 Clayton Act claim. Damages were awarded in the following amounts:

(1) Pueblo Bowl-O-Mat, Inc., Pueblo, Colorado	$ 964,830
(2) Holiday Bowl-O-Mat, Inc., Poughkeepsie, New York	$ 298,800
(3) Bowl-O-Mat Paramus Operations, Paramus, New Jersey	$1,094,400

Pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, the district court trebled each of these awards, and on May 31, 1973 entered judgment on the damage claims for $7,074,090. As a result of Brunswick's post-trial motions, which were in all other respects denied, the district court granted a new trial as to Pueblo Bowl-O-Mat, Inc., unless Pueblo consented to a remittitur of $499,050. *Treadway Cos., Inc. v. Brunswick Corp.*, 364 F. Supp. 316, 326 (D. N.J. 1973) (decision on post-trial motions). Pueblo did consent, and on October 5, 1973 an order was entered reducing Pueblo's treble damage recovery to $2,395,440. Thus the total damage award was $6,575,040. The district court also considered plaintiffs' application for an award of costs and attorney fees. On April 2, 1974 judgment was entered in the district court awarding $428,468 as attorney fees, and $18,509.32 as costs. On September 24, 1974, after the appeals both by plaintiffs and Brunswick from this award were dismissed by this court,[3] the district court entered an order pursuant to Rule 54(b), Fed. R. Civ. P. directing the following: (1) that the May 31, 1973 judgment, and the October 5, 1973 and April 2, 1974 orders, be entered as final; (2) that the entries be made *nunc pro tunc* as of their original dates for the purpose of fixing the time from which interest at the legal rate would accrue; (3) that the entries be made as of September 24, 1974 for the purpose of taking any appeals. The district court re-

3. See note 1 *supra*.

tained jurisdiction over the claim for equitable relief pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26.

Brunswick appeals from the damage award of $6,575,040; from the award of attorney fees and costs; and from the district court's decision awarding interest from the time of the original judgment and order rather than from the time of the Rule 54(b) certification. Brunswick does not dispute the amount of the award of attorney fees and costs assuming the jury verdict is allowed to stand. It contends, however, that if the verdict is set aside the award of fees and costs must also be set aside. Treadway appeals from the calculation of the fee award contending that it was too low.

On November 15, 1974, the district court filed an opinion,[4] and on January 9, 1975 entered a final judgment, pursuant to § 16 of the Clayton Act, enjoining Brunswick from acquiring any existing bowling centers in the Pueblo, Paramus and Poughkeepsie/Wappingers Falls areas and ordering divestiture of centers previously acquired in those areas. Brunswick filed an appeal from this judgment. On February 14, 1975 this court entered an order directing that Brunswick's appeal from the injunction and divestiture judgment (No. 75-1152) be consolidated with Brunswick's other appeal (No. 74-2127) and with plaintiffs' cross-appeal (No. 74-2128).

Brunswick's contentions, listed below in the order in which they shall be considered, present these questions:

(A) *With respect to the jury verdict:*

(1) Does the record establish a prima facie violation of § 7 of the Clayton Act by Brunswick?

(2) Are treble damages pursuant to § 4 of the Clayton Act recoverable by litigants in the plaintiffs' positions solely for a violation of § 7 of the Clayton Act?

4. Treadway Cos. v. Brunswick Corp., 389 F. Supp. 996 (D. N.J. 1974).

(3) Did the court properly instruct the jury as to the elements of a Clayton Act § 7 case?

(4) Was the jury properly instructed on § 4 damages?

(B) *With respect to the injunction and divestiture order:*

(1) Was there evidence in the record sufficient to support the court's finding of a Clayton Act § 7 violation?

(2) Does § 16 of the Clayton Act authorize the entry of a divestiture order, at the insistence of a private litigant, to redress a violation of Clayton Act § 7?

Plaintiffs' main contention on their cross-appeal is that the criteria for fee awards laid down in *Lindy Brothers Builders, Inc. v. American Radiator & Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) and reiterated in *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974), while properly applied by the district court, have no place in fully litigated antitrust actions. Rather, it is argued that these criteria should be applied only in class action settlements.

Virtually all of the issues before us are of first impression in this circuit and many are of first impression nationally. The antitrust questions arise because of the unique interaction among the Clayton Act § 7 which proscribes acquisitions having an effect which "*may* . . . substantially . . . lessen competition, or . . . tend to create a monopoly" and the private remedy provisions of § 4 and § 16 of the same act. A statutory prohibition aimed neither at existing conspiracies nor restraints, nor at existing or attempted monopolizations, but at incipient tendencies, presents problems of private enforcement not frequently encountered. Indeed this is perhaps the first case in which an award of money damages has been made to a private

plaintiff for an alleged violation of § 7. Thus the district court was exploring largely virgin antitrust territory. Certain errors were committed in this new territory which warrant a new trial. Reconsideration of the fee award will be required as well.

II. The Industry Background

Brunswick is one of the two largest manufacturers, distributors and financiers of bowling alley equipment in the United States. Its chief competitor is the American Machine and Foundry Company (AMF), a company about equal in size. Prior to 1964 Brunswick supplied the bowling recreation industry with large quantities of equipment such as lanes and automatic pinsetters. Since this equipment required a substantial capital investment Brunswick also financed the equipment on extended secured credit terms. In the early 1960's, however, the bowling recreation industry went into a sharp decline. The plaintiffs attribute this decline to overexpansion in the industry. They blame Brunswick for this overexpansion, claiming that it financed too many centers, and in particular, that it saturated certain areas with facilities so as to make competitive success impossible.

Simultaneously with the decline in the industry there occurred a collection problem. Defaults on equipment loans became commonplace. Numerous bowling center proprietors were in such hopeless financial straits that it became clear that there was no reasonable prospect of payment. Exercising its chattel security rights, Brunswick made numerous repossessions, and attempted to dispose of the repossessed equipment at discount prices. Such sales, however, did not keep pace with repossessions. Brunswick's efforts to lease repossessed lanes to new independent proprietors proved unsuccessful. Over the years Brunswick had borrowed close to $300 million in order to finance the manufacture and sale of bowling equipment. By late 1964 its receivables were in excess of

$400 million of which more than $100 million dollars were over 90 days delinquent. Brunswick was clearly in serious financial difficulty.

In an effort to reverse its deteriorating condition, Brunswick's management decided on a plan. In those cases in which attempts to collect receivables failed, it would repossess the equipment and attempt to sell it in place to third parties. If no sale could be effected Brunswick would then consider operating the failing centers itself if there appeared to be any reasonable prospect that a positive cash flow would result.

In January 1965 Brunswick formed a Bowling Center Operations Division (BCOD) charged with the responsibility of evaluating centers and operating those which could produce a positive cash flow. This development was disclosed by Brunswick's president to a meeting of the Bowling Proprietors Association, a retail level trade group, in 1965.

Between 1965 and 1972 BCOD evaluated over 600 defaulting centers for possible operation, commenced operating 222 of these, disposed of 11 to third parties, and closed 43 which proved unable to develop a positive cash flow. The highest number operated by Brunswick at any one time was 169. The largest number of centers taken over by Brunswick for operation in any year was 124 in 1965. Of these, centers in three areas are the subject of this appeal. They are Dutchess Lanes in Poughkeepsie, New York, Belmont Lanes in Pueblo, Colorado, and Fair Lawn Lanes, Interstate Lanes, Ten-Pin-on-the-Mall and Lodi Lanes in or near Paramus, New Jersey.

In each of the local retail market areas a Treadway subsidiary operated a bowling center competing for retail customers with the bowling centers taken over by Brunswick. The parties concede that each of these areas, Poughkeepsie, Pueblo, and Paramus, is a separate retail market for recreational bowling. Treadway does not manufacture or distribute bowling equipment or supplies.

The method used by Brunswick in taking over the operation of the six centers in issue was not identical. For our purposes, however, we can generalize. The acquisitions in question were by a major manufacturer of bowling equipment and supplies who took over bowling centers by means of stock or asset purchases. These newly-acquired facilities competed horizontally at the retail level with Treadway facilities and were kept in business by Brunswick when they otherwise would have failed.[5]

We can conclude our background survey of the bowling industry by noting that Brunswick now operates the largest number of retail bowling centers in the United States—167. The next largest retail bowling chain operates only 32 centers, and the rest of the retail market is fragmented among smaller chains and individual operators. It is conceded that the relevant market is local, however, not national. Brunswick's net assets far exceed the net assets of any other chain of bowling centers and it enjoys those additional advantages which accrue from being the manufacturer of the equipment used in its centers.

III. Summary of Plaintiffs' § 7 Theory

This case involves a "deep pocket" manufacturer's decision to integrate vertically forward into local retail markets and to compete with smaller competitors having shallower pockets. The jury verdict in favor of Brunswick on the Sherman Act § 2 claim establishes that this forward integration was not done in an attempt to monopolize the local retail bowling market. Plaintiffs contend, however, that the entry of such a competitor into these markets had the potential for lessening horizontal competition and that such potential lessening of competition suffices to establish a § 7 violation. It is therefore argued that Brunswick's

5. By contrast with Brunswick, although AMF undoubtedly suffered from the decline in the bowling recreation industry in the early 1960's it never integrated forward into the retail end of the business so as to be in competition with its actual or potential customers.

presence in these markets was illegal, and that plaintiffs suffered damages within the meaning of § 4. These damages were suffered, it is suggested, because in the absence of that illegal presence the acquired centers would have gone out of business thus effectively transferring customers to Treadway's centers.

IV. Was a Prima Facie Violation of § 7 Established?

A. *The potential effect on competition.*

This case does not present the classic § 7 problem of a merger with, or a purchase of assets from, a competitor on the same competitive level. Nevertheless, Brunswick's acquisitions had two aspects of possible significance for § 7 purposes. First, Brunswick was a major manufacturer integrating vertically forward into its customer market. Second, it was a giant entering local markets inhabited by pygmies. While both factors may have significance for purposes of § 7, in this case the first factor standing alone is not significant.

A major vice of vertical combinations is market foreclosure to competing manufacturers. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 323-24 (1962). But in the bowling industry there is only insubstantial continuous distribution from manufacturer to retailer. The principal products of the manufacturing end of the industry—pinsetters and alleys—are one-shot affairs, and the sales of these products by Brunswick had already taken place long before their reacquisition. It cannot be said, and it has not been shown, that AMF suffered or was likely to suffer any market foreclosure as a result of those reacquisitions. Moreover, Treadway is neither an actual nor a potential competitor at the manufacturing level, and hence is not a potential market foreclosure victim. Thus it probably lacks standing to assert the manufacturer's market foreclosure issue. In any event, manufacturer's market foreclosure is not the theory Treadway advances.

The second characteristic of the acquisition, however, is its potential effect on retail level competition. The entry of a giant into a market of pygmies certainly suggests the possibility of a lessening of horizontal retail competition. This is because such a new entrant has greater ease of entry into the market, can accomplish cost-savings by investing in new equipment, can resort to low or below cost sales to sustain itself against competition for a longer period, and can obtain more favorable credit terms. There is evidence from which the jury could have found that several of these factors applied to Brunswick's acquisitions in the Poughkeepsie, Paramus and Pueblo markets. Treadway urges that this evidence suffices to sustain the verdict that there was a § 7 violation. Brunswick, on the other hand, argues that there must be a showing of actual lessening of competition before the jury can find such a violation. We think, however, that Brunswick's argument confuses the showing which must be made to sustain recovery under § 4 with that which must be made to show a § 7 violation.

Three § 7 cases suggest that there was sufficient evidence here to go to the jury on the theory that Brunswick's entry into a local retail market both created the possibility of substantially lessening horizontal retail competition and tended toward the creation of a retail monopoly. Although these cases arose in three different merger contexts, they all involved the potential effect of mergers on horizontal competition.

Brown Shoe Co. v. United States, supra, involved a merger in which a major shoe manufacturer and retailer (Brown) acquired another retailer (Kinney). Thus, the merger had both vertical and horizontal aspects. First, the Court held that the vertical aspect of the merger—Brown's acquisition of a retailer—had potential market foreclosing effects for competing manufacturers and thus violated § 7. Second, the Court held that the Brown-Kinney combination had a potential for substantially lessening competition at the retail level. This conclusion was reached

even though Brown and Kinney, in combination, controlled but a small percentage of the retail shoe market, and even though Brown and Kinney had competed in only a small fraction of the geographic markets before the merger. It is true that since they did compete at retail, at least in a fraction of the geographic markets, the combination fits the classic § 7 pattern of a merger of competitors at the same level. But the significance of *Brown Shoe* lies less in that fact than in the Court's analysis of the probable effect of the merger on horizontal retail competition. Brown and Kinney in combination controlled only a small percentage of the retail shoe market. Yet, the Court declined to look at the mere quantitative substantiality of the resulting concentration. Instead it looked at qualitative substantiality. Among the qualitative factors which it mentioned were: (1) the fragmented nature of the retail industry; (2) the ability of a strong national chain to insulate selected outlets from the vagaries of local competition in selected locations; (3) the style leadership of the large chains and its effect on competitors' inventories; (4) the ability of an integrated manufacturer-retailer to eliminate wholesalers by increasing the volume of its retail purchases from its manufacturing division; and (5) the historical tendency toward concentration in the industry. 370 U.S. at 344-45. Finally, the court perceived in § 7 a congressional intention to protect small competitors even at the short run expense of consumers. It wrote:

> "[E]xpansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision." 370 U.S. at 344.

Of the major qualitative substantiality factors referred to in *Brown Shoe* there is evidence in this case tending to show that at least four may have been operative in the retail bowling recreation industry: a fragmented industry, the ability of a strong national chain to insulate itself from competitive vagaries in a local market Brunswick's promotional (style) leadership, and, after the debacle of the early 1960's, the tendency toward concentration. This is not to suggest that the evidence on any such factor was undisputed.

The qualitative substantiality approach of *Brown Shoe* pointed out rather clearly that although Brown and Kinney were retail competitors this factor was not of crucial significance for purposes of § 7. Many of the factors could result from the vertical integration of a pygmy into a giant in any wholesale or retail market. Shortly after *Brown Shoe* Chief Justice (then Judge) Burger so read the case. *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962). There a manufacturer of aluminum, Reynolds, acquired its customer, Arrow, a converter of aluminum into florist foil. The florist foil conversion industry was a line of commerce which consisted of approximately eight competitors who sold to 700 wholesale florist outlets. The District of Columbia Circuit refused to set aside an FTC order requiring divestiture. The court held, on the authority of *Brown Shoe*, that Arrow's assimilation into Reynolds' enormous capital structure and resources gave it an immediate advantage over its competitors. This advantage might have had the effect of substantially lessening competition or might have tended to create a monopoly.[6]

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6. Chief Justice (then Judge) Burger wrote:

"When Arrow was vertically integrated through the Reynolds' acquisition, one minor anti-competitive effect foreseeable was the exclusion of other manufacturers of raw foil (Reynolds' competitors) from selling to approximately 33% of the florist foil converting industry. However, neither the examiner nor the Commission rested their conclusions that Sec. 7 had been violated on this basis, nor should we. The truer picture of anti-competitive effect emerges from even the most cursory consideration of the post-acquisition competitive postures of the eight previously independent florist foil converters *vis a vis* one another. Arrow's assimilation into

In 1967 the Supreme Court made explicit what had been implicit in *Brown Shoe*—that a merger or acquisition fell within § 7 even though the acquiring corporation and the acquired one were not competitors and even though the transaction did not involve potential market foreclosure of suppliers. In *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967), it affirmed an FTC determination that Proctor & Gamble's acquisition of Clorox Chemical Company in a "product extension" merger violated § 7. Horizontal competition in the household bleach market was threatened, the Court concluded, because Clorox, already a dominant force in that market, would have the benefit of Proctor & Gamble's advertising discounts, retailing distribution network, and deep pocket. New entrants into the bleach market might be discouraged, active competition might be inhibited by fear of retaliation from so strong a force, below cost sales might be financed by Proctor & Gamble's deep pocket.

The marketing of household bleach is, of course, only remotely comparable to the marketing of recreational bowling. But the Court's analysis in *Proctor & Gamble* shows that Chief Justice Burger's reading of *Brown Shoe* was correct. In some industries the acquisition of a competitor by a deep pocket parent can have sufficient potential to harm horizontal competitors so as to violate § 7. There was sufficient evidence of such potential here to submit the case to the jury on the issue of effect on competitors.

6. (Cont'd.)
Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. The power of the "deep pocket" or "rich parent" for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition. The Commission is not required to establish that the Reynolds' acquisition of Arrow did in fact have anti-competitive consequences. It is sufficient if the Commission shows the acquisition had the capacity or potentiality to lessen competition. That such a potential emerged from the combination of Reynolds and Arrow was enough to bring it within Sec. 7." 309 F.2d at 229-30 (footnote omitted).

B. *The "in commerce" requirement.*

Section 7 applies when a corporation "engaged in commerce" acquires the stock or assets of "another corporation engaged also in commerce." At the time this case was tried, the Third Circuit was committed to the proposition that the Clayton Act § 7, like §§ 1 and 2 of the Sherman Act, represented an exercise of Congress' full powers under the commerce clause. In *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 166 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953), Judge Maris wrote that Congress, in enacting § 7, intended "to exercise its power under the commerce clause of the Constitution to the fullest extent."

Had the district court been possessed of perfect foresight, it would have foreseen a major development in § 7 law that was just over the horizon. In *United States v. American Building Maintenance Industries*, 43 U.S.L.W. 4838 (U.S. June 24, 1975), the Supreme Court considered the jurisdictional reach of § 7.[7] It concluded that unlike §§ 1 and 2 of the Sherman Act, § 7 did not encompass the whole of the commerce power. Effectively, *Transamerica Corp. v. Board of Governors*, *supra*, had been overruled. The Supreme Court wrote:

> "In sum, neither the legislative history nor the remedial purpose of § 7 of the Clayton Act, as amended and reenacted in 1950, supports an expansion of the scope of § 7 beyond that defined by its express language. Accordingly, we hold that the phrase 'engaged in commerce' as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." 43 U.S.L.W. at 4842.

Applying this new standard to the record before us is a problem of no little difficulty. In fact, had the district court granted a motion to dismiss at the close of the plain-

7. It had refused expressly to decide the question in Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202 (1974).

tiffs' case, on the ground that the new § 7 threshold had not been met, we might have been inclined to affirm that decision. There was, however, some evidence in the record to suggest that at least some of the acquired bowling centers may have made purchases of pins, pinsetter parts and perhaps other supplies, directly from Brunswick, rather than from local distributors. Thus, they arguably were engaged "in the flow of interstate commerce" within the meaning of the new § 7 test. We think it would be unjust, given the intervening change in the law, to find that the evidence presented was insufficient to cross the jurisdictional threshold and thus order that the district court dismiss the case. We think it more appropriate, consistent with the way in which we will ultimately dispose of the case, to have the "in commerce" question relitigated, with the plaintiffs' being given an opportunity to satisfy the new and more stringent jurisdictional test. See 28 U.S.C. § 2106.

V. Does § 4 Provide A Private Remedy For This § 7 Violation?

Until the Supreme Court read the first paragraph of § 7 disjunctively in the *du Pont* cases [8] so that it covered not only the horizontal acquisition of a competitor, but also acquisitions of non-competitors, the possibility of private recovery for a § 7 violation was remote. *Du Pont* involved a § 7 violation resulting from du Pont's acquisition of a 23% stock interest in General Motors, a company to which du Pont supplied paint and fabric. Subsequently, minority stockholders of General Motors brought a derivative action against du Pont seeking (1) § 4 damages from du Pont for the § 7 violation found in the government case, (2) damages for violations of §§ 1 and 2 of the Sherman Act, and (3) damages for a breach of a common law fiduciary duty. In an interlocutory decision, the district court held that since § 7 violations involved potential restraints or monopoliza-

8. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957); *id.*, 366 U.S. 316 (1961).

tions such violations could not support recoveries under § 4 for injuries to business or property.[9] The case proceeded to trial on the Sherman Act and fiduciary duty claims and resulted in a judgment for du Pont.[10] On appeal from this final judgment the Second Circuit reversed the earlier interlocutory holding that a § 7 violation could not be the basis for a § 4 recovery. *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969). (*Gottesman I*). Judge Feinberg's opinion required, in effect, that the plaintiff show (1) a violation of § 7, (2) an actual injury causally connected to the violation, and (3) damages of a reasonably certain amount flowing from the causally connected injury. The § 7 violation in the *du Pont-General Motors* case was the potential market foreclosing effect of du Pont's 23% ownership of a large customer for automotive fabrics and finishes. The great significance of *Gottesman I* was that it did not hold that only those foreclosed from the General Motors market could recover. General Motors itself, which was not in the fabrics and finishes business, could recover as well. The Second Circuit remanded to the district court for a reconsideration of the evidence in the light of this interpretation of the interaction between § 7 and § 4.

On remand, the district court again held for du Pont.[11] When appealed, the Second Circuit, in an opinion by Judge Maris, affirmed. *Gottesman v. General Motors Corp.*, 436 F.2d 1205 (2d Cir.), *cert. denied* 403 U.S. 911 (1971) (*Gottesman II*). It is in this latter opinion that the Second Circuit fully considered the damage issue. Damages were not awarded because General Motors stockholders did not prove that the company paid a higher price to du Pont for fabric and finishes than was charged to other du Pont customers and did not prove that the materials in question could have been purchased on the open market, at lower

9. Gottesman v. General Motors Corp., 221 F. Supp. 488 (S.D. N.Y. 1963), *leave to appeal denied*, (2d Cir. Jan. 31, 1964), *cert. denied*, 379 U.S. 882 (1964).

10. 279 F. Supp. 361 (S.D. N.Y. 1967).

11. 310 F. Supp. 1257 (S.D. N.Y. 1970).

prices, with equal quality and service. Plaintiffs did not prove, in other words, that General Motors' business or property had been injured.

Brunswick and Treadway attach diametrically opposed significance to *Gottesman I* and *II*. Brunswick's theory is that there can be a § 4 recovery only if there is an actual foreclosure of competitors or an actual lessening of competition which results in injury. That approach may work in a situation such as *du Pont-General Motors* where the § 7 violation depends upon the potential for market foreclosure. A party losing foreclosed sales might then recover lost profits, and the foreclosed customer such as General Motors, might recover overcharges. But when the § 7 violation depends upon the potential injury to a horizontal competitor at the same level as the acquired company, Brunswick's approach would virtually preclude recovery by the competitor until he has been driven out of business.

Brunswick also focuses on the "substantially to lessen competition" language of § 7 and urges that no recovery can be had when activity in the marketplace has the effect of preserving a competitor and reducing consumer prices. But to focus on short run beneficial effects on consumer prices is to disregard the disjunctive "or tend to create a monopoly" clause in § 7, and to confuse injury to the public with injury to competitors. The public is not injured while a potential monopolist is vigorously competing to achieve monopoly power, though that injury may come later. Competitors, on the other hand, are injured in their business or property in a short-run period of predatory competition. Brunswick would permit recovery only when there is an injury to competition (such as market foreclosure) and an injury to the competitor.

Treadway's theory differs from Brunswick's. It argues that if an acquisition is illegal under § 7 because it has a sufficient potential to injure competition or to tend to create a monopoly, then the mere presence of the violator in the market which in fact produces a causally linked injury

to the business or property of the competitor suffices for a § 4 recovery. To require more it urges, is to force a private plaintiff to prove a Sherman Act § 1 or § 2 violation and to eliminate private damage recoveries for § 7 violations.[12] Under Treadway's theory it can recover the profits on any sales which it lost by virtue of Brunswick's presence, or any sales which it would have gained in Brunswick's absence.

Treadway's interpretation of the interaction between § 7 and § 4 obviously has far-reaching ramifications. Nevertheless, we believe it to be more consistent with the purposes of § 7 to hold that illegal presence which causes injury to the business or property of a competitor is compensable under § 4. This is not to say that proof of a § 7 violation will permit every competitor of the acquired company to recover automatically. As can be seen from *Gottesman II*, the proof of causal connection and of damage still is formidable.

We hold, then, that a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition. In this case there was sufficient evidence to go to the jury on the fact of such injury, although as we indicate hereafter there are difficulties with the manner in which the issue was framed in the court's charge.

12. In *Gottesman I* the Second Circuit wrote:

"The basis of the pre-trial ruling was that a section 7 violation can cause no damage because it establishes only that harm was threatened, not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages. . . ." 414 F.2d at 961.

Referring to this language, two prominent commentators have noted:

"It becomes readily apparent that if the plaintiff has to establish that the threatened harm (probable restraint or monopolization) has ripened into reality, he, in effect, has the burden of establishing an actual restraint or actual monopolization. Thus, the practical effect might be to transform into an action based on §§ 1 and 2 of the Sherman Act a suit based on § 7 of the Clayton Act." Kintner & Wilberding, Enforcement of the Merger Laws By Private Party Litigation, 47 Ind. L.J. 293, 312 (1972).

VI. Did The Court Properly Charge A § 7 Violation?

A. *The impact on competition.*

In presenting the case to the jury the district court first charged on the Sherman Act § 2 aspects on which, as we pointed out above, there was a verdict for Brunswick. The court then turned to the § 7 count, explaining that there were three elements involved in determining whether Brunswick violated that section: (1) the relevant lines of commerce, (2) the relevant geographic markets, and (3) "the likely anticompetitive effects of the acquisition of bowling centers in the relevant local market." (4 App. at 2268a). The court then indicated that there were three relevant geographic markets for bowling center operations, and continued:

> "You must decide whether the effect of the acquisition of bowling centers by Brunswick may be substantially to lessen competition or tend to create a monopoly in that 'line of commerce' and 'section of the country.'
>
> The determination of this question will establish whether or not this acquisition was a violation of Section 7 of the Clayton Act.
>
> This determination must be made in light of several factors: the primary index of legality is the market share of the acquired and acquiring companies and the extent of concentration in the industry.
>
> An acquisition which produces a firm controlling an undue percentage of the relevant market and resulting in a significant increase in concentration is presumptively unlawful, unless the defendants can overcome this presumption by other evidence to establish the vigor of competition or affirmative justifications in support of the acquisition.
>
> While market shares are not determinative of legality of an acquisition, I instruct you that high market shares and significant increases in concentration may be sufficient in itself to establish a violation of Section 7. Section 7 of the Clayton Act may be violated either by showing a reasonable probability of a substantial lessening of competition in the future or by showing a substantial lessening of competition which has already occurred." (4 App. at 2269a-70a).[13]

This charge, in the context of the acquisition of retail outlets in relatively small geographic markets, was virtually a directed verdict. Without highlighting other factors, it emphasized the market share held by Brunswick in each of the markets in question, after the acquisitions.

The charge was defective in a number of ways. It did not say, for example, that the jury must consider such factors as the relative financial strength of Brunswick,

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13. Referring later to specific acquisitions the court reiterated its emphasis on quantitative substantiality:

"Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Pueblo area beyond an insubstantial amount, say beyond 10 to 15%, may be sufficient for you to conclude that competition has substantially been lessened. Consequently, you properly may conclude that Brunswick by the acquisition of Belmont Lanes violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained allegedly more than 20% of the Pueblo, Colorado, bowling center market." (4 App. at 2317a-18a).

"Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Poughkeepsie area beyond an insubstantial amount, say beyond 10 to 15 per cent, may be sufficient for you to infer that competition has substantially been lessened.

Consequently, you may properly conclude that Brunswick by the acquisition of Dutchess Lanes violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained more than 20 per cent of the Poughkeepsie, New York bowling center market." (4 App. at 2319a-20a).

"Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Paramus area beyond an insubstantial amount, say beyond 10 to 15 per cent, may be sufficient for you to infer that competition has substantially been lessened.

Consequently, you may properly conclude that Brunswick by the acquisition of Interstate, Fair Lawn, Ten Pin Lanes and Lodi Lanes violated Section 7 of the Clayton Act because Brunswick through those acquisitions obtained allegedly 39 per cent of the Paramus, New Jersey, bowling center market." (4 App. at 2320a-21a).

Treadway, and other competitors. This would have been significant, for although Brunswick was many times larger than Treadway, the latter was still a large public company, and in the bowling recreation industry there are practical limitations on the extent to which capital may be utilized for competitive advantage. Nor did the charge say that the jury must find that Brunswick's position as an equipment manufacturer or equipment financier gave it any retail market advantage.[14] Certainly if the vertical integration forward had this effect the jury could have found a tendency toward monopolization or the potential for a substantial lessening of competition. The jury also was not asked to take into account the historical tendency in the industry toward concentration or lack of such a tendency.

By emphasizing the quantitative substantiality of the market shares held by Brunswick, to the exclusion of other factors, the court failed to draw the jury's attention to the indicators of qualitative substantiality referred to in *Brown Shoe Co. v. United States, supra, Reynolds Metals Co. v. FTC, supra,* and *FTC v. Proctor & Gamble Co., supra.* While the quantitative substantiality of the market shares is important in a case involving a merger of horizontal competitors, it is far less important here because Brunswick was not previously in any of the three markets. Brunswick's entry into the picture did not increase concentration, but only acted as a substitution of competitors.

Treadway would have us overlook the deficiencies in the § 7 charge because extensive "deep pocket" evidence was introduced on the Sherman Act § 2 claim and the jury was instructed as to the relevancy of that evidence to that claim. There are two obstacles here. First, the court in its instructions quite clearly treated the two counts separately, and

14. As to Brunswick's position as a manufacturer and financier, the district court repeated the following charge with respect to each of the three markets in dispute:

"You may consider that Brunswick describes itself as 'Number One in Bowling' and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers." (4 App. at 2317a, 2319a, 2320a).

we must assume that the jury understood as much. Second, because of the verdict in Brunswick's favor on the Sherman Act § 2 count we cannot speculate as to how the jury evaluated the "deep pocket" evidence.

Because the § 7 charge was inappropriate to the only theory upon which a § 7 violation could in the circumstances of this case be predicated, a new trial is required.

B. *The commerce requirement.*

The district court charged:

> "Each of these plaintiffs, to be entitled to prevail on its claim under Section 7 of the Clayton Act, must prove . . . :
>
> First, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce." (4 App. at 2342a).

Elsewhere, however, the court had charged:

> "The undisputed evidence shows that Brunswick acquired Belmont Lanes in April 1965. As a matter of law this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Pueblo, Colorado, metropolitan area." (4 App. at 2317a).

It gave almost the identical instruction with respect to the Poughkeepsie acquisition. (4 App. at 2319a).

Brunswick contends (1) that the charge is internally inconsistent and (2) that the specific reference to the acquisitions being in a line of commerce amounted to a directed verdict on the interstate commerce issue. We think, however, that in the first quotation the court refers to the "engaged in commerce" requirement, while in the second, it refers to the "in any line of commerce in any section of the country" requirement. Certainly bowling centers are in a line of commerce in a section of the country, although

arguably they are only engaged in local rather than interstate commerce.

The interstate commerce charge is cryptic but we need not comment on it any further. When the case is retried, the district court will have to apply the new § 7 interstate commerce test laid down in *United States v. American Building Maintenance Industries, supra*. See Part IV B, *supra*.

VII. Was The Jury Properly Instructed On § 4 Damages?

We have already held that a horizontal competitor injured in its business or property by the presence in the market of a § 7 violator can recover under § 4. Treadway had the burden under § 4 of establishing the fact of such injury, the proximate causal relationship of that injury to Brunswick's presence in the market, and the amount of damage suffered.

To meet this burden the only evidence offered by plaintiffs was the expert opinions of several witnesses as to what profits the Treadway bowling centers would have made if Brunswick, instead of acquiring the centers, had permitted them to close.

The court charged:

> "Plaintiffs' witnesses Kenney, Mendelson, Davis, Lieblich and Gonzalez, all were qualified as expert witnesses. They were entitled to give their opinion as to profits which the plaintiff bowling centers would have made but for defendant's violations of law. These witnesses estimated the amount of business which would have come to plaintiffs' bowling centers if Brunswick had not operated a competitive center or had permitted it to close down in the normal course. . . .
>
> Although there was some differences in amount, these witnesses mutually corroborated each other both

> in the methods used in determining damages and in general estimates as to the extent of damages. I instruct you that if you believe any one of Messrs. Kenney, Mendelson, Davis, Lieblich and Gonzalez was telling the truth, then you must believe that all were telling the truth since they mutually corroborated each other and since there was no contradictory evidence offered by Brunswick as to extent of damages, except that the defendant denies that the plaintiffs are entitled to any damages.
>
> . . . You may disregard this testimony as to damages only if you find all these witnesses, Messrs. Kenney, Mendelson, Davis, Lieblich and Gonzalez, were discredited or impeached by contradictory evidence. I instruct you that if you find that the antitrust laws have been violated and that plaintiffs' corporations have been injured thereby, then you must also find damages in the amounts falling within the range as indicated by the testimony and exhibits, apart from any determination you may make as to those damages related to Fort Lauderdale and to plaintiffs' various interest expenses." (4 App. at 2326a-27a).

The court then reviewed the damage testimony. The thrust of this instruction, indeed the thrust of plaintiffs' § 4 theory, was that damages were to be computed by first assuming that each Brunswick-acquired center would have closed down at the moment of the takeover, but for the takeover and then by projecting what portion of the closed center's business would have been captured by Treadway's centers. However, since plaintiffs' § 7 theory was based on the presence of the violator, Brunswick, in the market, the jury should have been determining what plaintiffs' profits would have been if the violations had *never* occurred. In other words, the jury should have first been instructed to find whether the acquired centers would, in fact, have gone out of business, rather than being taken over by someone

else or continuing in business by extensions of credit. Such a finding was a prerequisite to establishing any proximate causal relationship between the § 7 violation and the only evidence of injury to business or property which was presented.

The inadequacy of the § 4 charge is brought into sharp relief by the court's instruction on the so-called "failing company" defense.[15] Since the jury rejected this defense with respect to each of the acquired centers, it must have concluded that none of the centers would inevitably have gone out of business. In the § 7 context the failing company defense was a matter on which the defendant Brunswick had the burden of proof. But in the § 4 context plaintiffs had the burden of proving an injury to their property or business proximately related to the violation. The effect of the damage charge was to relieve them of that burden and permit the jury to award damages on a theory which assumed an essential fact on which no finding was made.

The damage charge was defective in another respect. The court referred to the testimony of Treadway's witnesses estimating the amount of business which would have come to the Treadway Centers had the acquired centers closed down and to an exhibit recapitulating that testimony. Next it noted that Brunswick had not offered evidence on the damage question, and charged

> "I instruct you that if you find that the antitrust laws have been violated and that the plaintiffs' corporations

15. The court charged:

"A company is not a failing company merely because it is experiencing financial difficulties or temporary losses.

To qualify under the failing company doctrine, the resources of the acquired business must be so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure.

The 'failing company' defense, therefore, is a very restricted one. The acquiring company must show that the acquired company faced the grave probability of business failure, and that it was the only available buyer.

And it must show that there was no prospect for reorganizing the company which was acquired.

If some of the centers which Brunswick acquired were not failing, and if operators other than Brunswick could and would have acquired the centers in question, the doctrine does not apply." (4 App. at 2321a-22a).

> have been injured thereby, then you must also find damages in the amounts falling within the range as indicated by the testimony and exhibits. . . ." (4 App. at 2327a).

This was error, for it is clear that a trier of fact is at liberty within the bounds of reason to reject in whole or in part the uncontradicted testimony of a witness which does not convince the trier of its merit. This rule applies on the issue of damages as on any factual issue. *Rhoades Inc. v. United Air Lines, Inc.*, 340 F.2d 481, 485 (3d Cir. 1965).

Even if the § 7 charge had been entirely proper we would award a new trial because of the § 4 instruction.

Brunswick would have us hold that the jury's rejection of the failing company defense means that the only factual premise upon which plaintiffs' § 4 injury to property or business theory may be predicated has been decided against it, and that Brunswick should have judgment rather than a new trial. But the jury may only have decided that Brunswick had not established the defense by a preponderance of the evidence, and probably did not consider whether in order to find a § 4 injury it had to find that the acquired centers would have closed. Since there is evidence from which the jury might have found that the centers would have closed, a new trial with proper instructions is appropriate.

VIII. The § 16 Relief

A. *The district court's finding of a § 7 violation.*

Based upon the same evidence presented to the jury the district court concluded that the violation of § 7 warranted injunctive relief pursuant to the Clayton Act § 16. In doing so it rejected Brunswick's argument that the favorable verdict on the Sherman Act § 2 attempt to monopolize count established its beneficent intentions, and that no relief should be awarded on the assumption that the acquisitions might "tend to create a monopoly." It requested the court

to make specific findings of misconduct as a predicate for specific injunctive relief. To some extent the court did so, but it is clear that an essential predicate for the decision was that the jury verdict established Brunswick's unlawful presence in the market.[16] Since this is so, and since we are granting a new trial on the § 7—§ 4 aspects of the case, we conclude that the § 16 order must also be set aside. We are obliged, of course, to review the district court's findings of fact by a different standard. But with clear indications of the court's reliance on the jury's verdict, a verdict which we have concluded is tainted by erroneous legal instructions, we think the § 16 relief must also be reconsidered after a new trial.

B. *The divestiture order.*

Since we are granting a new trial the district court may again be asked to consider whether divestiture is a remedy available to a private plaintiff under § 16 of the Clayton Act. The authorities on that issue differ.[17] Until

16. The district court stated:

"In fashioning this remedy, I find it necessary to expressly state the factual basis on which I shall make my ruling. Although I have specifically made findings concerning the anti-competitive practices utilized by the defendant in causing the plaintiffs' injury, I also find in the alternative that the factual presence of the defendant in this market is sufficient to prompt the equitable intervention of this Court. In so finding, I adhere to the argument advanced by the plaintiffs that actual anti-competitive effects, let alone the causal mechanisms by which they were induced, are not necessary precedents to finding a violation of Clayton Section 7 nor to ordering equitable relief.

. . . The very fact of the jury's finding, unless it was so erroneous as to demand a judgment n.o.v. which I have previously denied, is sufficient to support my present decision to order injunctive relief." 389 F. Supp. at 1000-01.

17. Cases declining to grant a private divestiture remedy include: International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., No. 73-1513 (9th Cir. Apr. 25, 1975); Continental Sec. Co. v. Michigan Cent. R.R., 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927); American Commercial Barge Line Co. v. Eastern Gas & Fuel Associates, 204 F. Supp. 451 (S.D. Ohio 1962); Graves v. Cambria Steel Co., 298 F. 761 (S.D. N.Y. 1924) (L. Hand, J.); Venner v. Pennsylvania Steel Co., 250 F. 292 (D. N.J. 1918).

Cases suggesting the availability of a private divestiture remedy include: International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 351 F. Supp. 1153, 1203-11 (D. Hawaii 1972) and Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606, 614-17 (C.D. Cal. 1972), both of which are

the Ninth Circuit's recent opinion in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, No. 73-1513 (9th Cir. Apr. 25, 1975), no court had made any real effort to analyze the problem in terms of congressional intention. The Ninth Circuit opinion makes an exhaustive analysis of the available legislative history and concludes, learned commentary to the contrary notwithstanding,[18] that Congress did not intend to create a private divestiture remedy when it enacted the injunctive relief provision of § 16.

No third Circuit opinion enlightens us on this problem. We have independently reviewed the available legislative history referred to in Judge Goodwin's extended opinion in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., supra.* We agree that it supports his conclusion that many members of the Senate and House Committees which considered the problem in the Sixty-third Congress assumed that § 16 did not create a private divestiture remedy. We will not burden this opinion with a repetition of Judge Goodwin's analysis.

It is quite another question whether legislative history from 1914, strong as it appears, should control the contemporary application of a statute laying down a fundamental national economic policy. This is especially true when the significance of the circumstances to which application is sought were perceived dimly, if at all, at the time of passage. The antitrust laws are of necessity statements of

17. (Cont'd.)

reversed on the issue by International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., *supra;* Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76 (N.D. Cal. 1972); Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120 (N.D. Cal. 1970); Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D. N.Y. 1965); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964), *aff'd per curiam*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).

18. Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 Minn. L. Rev. 267 (1964).

general principle. They must be given meaning in specific applications on a case-by-case basis. It is impossible for a legislature to devise codes so all-encompassing as to predict every case to which the general principle should apply. So, too, with antitrust remedies. There is a danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of statutes which are almost an economic constitution for our complex national economy.

But we need not, in this case, decide a rule of general application with respect to the availability of divestiture relief under § 16. Even if such a private remedy is available, it would in our view be inappropriate because less drastic relief will provide sufficient redress.

It must be recalled that we are dealing with three specific geographic markets, and thus with three separate problems of relief. The focus of the remedy, then, must be on what can be accomplished to overcome the threat to competition in those specific markets. If the suit had been commenced at a time when the court might have prevented the acquisitions by Brunswick or any other deep pocket owner, and if it had done so, one of two things might have happened. Brunswick might have allowed the bowling centers to close, and would thereby have eliminated any § 4 injury to plaintiffs' property or business. Alternatively, Brunswick might have found another purchaser whose presence in the market would have retained the same level of competition. The injury to Treadway's property or business at least on this record would have been the same, but there would have been no § 7 violation on which to predicate either a § 4 or a § 16 action. At this late stage, ten years after the acquisition, divestiture of going, thriving bowling centers to other purchasers will not change the competitive picture. By now the formerly threatened businesses have survived.

An alternative to a sale, of course, would be to dismantle the centers. But at this time such a procedure would

merely reduce competition artificially in the three markets to the detriment of the public. If this had been a merger between competitors so that its effect would almost inevitably have been anticompetitive, divestiture, if authorized, might have been appropriate. But where the § 7 violation is by a new entrant purchasing an existing competitor in an existing market, relief should be restricted to preventing those practices by which a deep pocket market entrant harms competition. Otherwise what is intended as a shield for smaller competitors becomes a sword against the consumer. Given the type of § 7 violation which plaintiffs alleged and attempted to prove, divestiture was simply inappropriate.

IX. Attorney Fees And Costs

Since we are granting a new trial on the treble damage claim, the award of attorney fees and costs must also be set aside.[19] But since the district court may be faced with the question of attorney fees after a new trial, it is appropriate to consider plaintiffs' contention that the principles of *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., supra,* are applicable only to class actions and not to litigated antitrust cases. The district court properly understood the *Lindy Brothers* holding. It laid down principles of general application for the award of attorney fees. There is no exception for litigated antitrust cases. If a new award is made the court should be guided by the principles of *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., supra;* and *Merola v. Atlantic Richfield Co., supra.*

19. DeFilippo v. Ford Motor Co., 516 F.2d 1313, 1321 (3d Cir. 1975); Bryam Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649, 651 (3d Cir. 1967) (attorney fees not recoverable in absence of treble damage award).

Conclusion

The judgments appealed from in Nos. 74-2127 and 75-1152 will be reversed and the case remanded for further proceedings in accordance with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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APPENDIX B

Opinion of the U.S. District Court for the District of New Jersey Dated September 17, 1973

UNITED STATES DISTRICT COURT
District of New Jersey

Civ. A. No. 595-66

September 17, 1973

Treadway Companies, Inc., *et al.*,
Plaintiffs,

v.

Brunswick Corporation,
Defendant.

Cole, Geaney & Yamner, Paterson, N. J., Law Firm of Malcolm A. Hoffmann, Malcolm A. Hoffmann, New York City, for plaintiffs.

Stryker, Tams & Dill, Arthur C. Dwyer, Newark, N. J., Mayer, Brown & Platt, Miles G. Seeley, Thomas B. McNeill, Chicago, Ill., for defendant.

Opinion

Whipple, District Judge:

The trial of this case began for the second time on March 13, 1973 and concluded on May 11, 1973 with the following verdicts being returned:

1. In favor of defendant Brunswick and against plaintiffs Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus, Paradise Bowl-O-Mat, Inc., Treadway Companies, Inc. (for losses claimed to have been suffered by the closing of Fort Lauderdale Bowl-O-Mat, Inc.), Treadway Companies, Inc. (for losses claimed to have been suffered by interest charges) and Indianapolis Bowl-O-Mat, Inc., with respect to the claims of monopolization and/or attempted monopolization asserted by them, under 15 U.S.C. § 2.

2. On the so-called "acquisition claims" based on § 7 of the Clayton Act, against defendant Brunswick and in favor of the following plaintiffs in the following amounts: Holiday Bowl-O-Mat, Inc., $298,800, Bowl-O-Mat Paramus Operations, $1,094,400; Pueblo Bowl-O-Mat, Inc., $964,830.

On May 31, 1973, this Court, having previously trebled the amounts awarded to the plaintiffs on the Section 7 claims pursuant to 15 U.S.C. § 15, entered judgments reflecting the jury verdicts. Within ten days after the entry of said judgments, defendant brought the instant motion pursuant to Fed.R.Civ.P. 50(b) for a judgment notwithstanding the verdict or in the alternative for a new trial. A more detailed statement of facts is not presently necessary; where facts do become operative, the Court will set them out. The grounds for the motion are numerous and will be treated *seriatim*.

I

[1-4] Motions for a judgment notwithstanding verdict, since they are, by definition, "intrusions upon the province of the jury", must be granted cautiously and sparingly.

Rumsey v. Great Atlantic and Pacific Tea Company, 408 F.2d 89, 91 (3rd Cir. 1969). In ruling on the motion, the Court must review the evidence and all reasonable inferences in a light most favorable to the party who prevailed at the trial. Thomas v. E. J. Korvette, Inc., 476 F.2d 471, 474 (3d Cir. 1973); *Rumsey, supra,* at 90 of 408 F.2d; 5A J. Moore, Federal Practice ¶ 50.07[2]. In fact, it is the general rule that such a motion may only be granted where "reasonable minds could reach no other conclusion". Pope v. Holiday Inns, Inc., 464 F.2d 1303, 1306 (5th Cir. 1972); Sotell v. Maritime Overseas, Inc., 474 F.2d 794, 796 (2nd Cir. 1973); Reeves v. Power Tools, Inc., 474 F.2d 375, 380 (6th Cir. 1973). It is the further duty of this Court upon the instant motion to refrain from weighing the evidence and to ignore the credibility of the witnesses. Cole v. Chevron Chemical Co.—Oronite Division, 477 F.2d 361, 367 (5th Cir. 1973). It is upon these procedural guidelines that defendant's motion will be considered.

Defendant's initial argument is that its motion for a directed verdict at the close of plaintiffs' case was improperly denied as a matter of law. The first specific argument under this general heading is that the plaintiffs failed to present any evidence from which the jury could properly conclude that defendant's operation of competing bowling establishments gave rise to any reasonable probability that competition would be lessened or that a monopoly would tend to be created in violation of § 7 of the Clayton Act, 15 U.S.C. § 18.

The crux of the defendant's hypothesis is that the activity in which it engaged cannot be violative of § 7 as a matter of law because that activity had the effect of preserving competition rather than reducing it. Entwined in

this proposition are the defendant's subordinate contentions that (a) even if competition could be lessened or a monopoly created by their actions, damages could not, as a matter of law, flow therefrom, and (b) even if damages could flow as a matter of law, none were proven.

[5] The only purely legal issue implicit in this theorem, in this Court's view however, is whether a private party can, as a matter of law, recover damages for a § 7 violation. The conceptual difficulty inherent in this question is that the Act speaks in terms such as "*may* be to lessen competition, or to *tend* to create a monopoly". Thus, can a violation caused by a tendency result in damages? The question was laid to rest in Gottesman v. General Motors Corporation, 414 F.2d 956, 960-961 (2nd Cir. 1969), cert. denied, 403 U.S. 911, 91 S.Ct. 2208, 29 L.Ed.2d 689 (1970):

> We agree with those authorities cited above that indicate that a violation of Section 7 of the Clayton Act does furnish a basis for a claim for money damages under the broad language of Section 4 of the Act. . . . The basis of the pre-trial ruling was that a Section 7 violation can cause no damage because it establishes only that harm was threatened, not that it occurred. But if the threat ripens into reality we do not see why there can never be a private cause of action for damages.

[6, 7] The legal issue of capacity being answered, the only remaining question is whether the plaintiff carried his burden of proof. As the court stated in *Gottesman*:

> If Section 7 is designed to prevent acquisitions that "may" or "tend to" cause specified harm, such an

> acquisition may either itself directly bring about the harm or make possible acts that do. We do not say that a Section 7 violation must, or even probably will, have that result; but that it may and that plaintiffs should have a chance to prove injury "by reason of" the violation are persuasive propositions.

414 F.2d at 961. The question of whether the plaintiffs proved their damages as a proximate result of the defendant's activities is one for the fact-finder, *see* Dailey v. Quality School Plan, Inc., 427 F.2d 1080 (5th Cir. 1970). There was ample evidence adduced at the trial to show how Brunswick's entry into the retail market lessened competition, *see* Reynolds Metals Co. v. F. T. C., 114 U.S. App.D. C. 2, 309 F.2d 223 (1962); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966), and this Court views the matter as one where reasonable minds could reach *more* than one conclusion. The instant motion, therefore, cannot be granted on this ground.

The next point pressed by the defendant is that plaintiffs failed to prove that the competing bowling establishments acquired by Brunswick were engaged in interstate commerce as required by § 7. The authority with respect to § 7 is nonexistent, but there are cases dealing with bowling under other sections of the antitrust laws. This authority can, it seems to this Court, be employed in the instant case.

Defendant cites Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2nd Cir. 1964) as supportive of their position. The Court stated in its opinion of defendant's motion for a directed verdict, however, that *Lieberthal* is distinguishable from this case because the amount of interstate activity proven is greater than that alleged in *Lieberthal* and be-

cause the test enunciated in that case was the effect of the activity on interstate commerce.

[8] Additionally, and perhaps more importantly, the jury in this case was specifically instructed that the plaintiffs were required to "prove . . . [f]irst, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce." If the jury answers the above question in the affirmative, the jurisdictional issue is concluded, Washington State Bowling Proprietors Association v. Pacific Lanes, Inc., 356 F.2d 371, 380 (9th Cir.), cert. denied, 384 U.S. 963, 86 S.Ct. 1590, 16 L.Ed.2d 674 (1966); Bowl America, Inc. v. Fair Lanes, Inc., 299 F.Supp. 1080, 1090 (D.Md. 1969), except to the extent that this Court must examine whether the jury's conclusion was at all possible based on the evidence. As has been stated, there exists sufficient evidence to sustain such a conclusion. The instant motion cannot, therefore, be granted on this basis.

[9] On the same general issue, defendant argues that, as a matter of law, the jury could not have found that two of the establishments acquired by Brunswick, Fair Lanes and Interstate Lanes, were "engaged in commerce" at the time of the acquisition. This is allegedly so because Brunswick purchased the stock of these two companies after their parent company, American International Bowling Corporation (AIBC), had gone into bankruptcy.

As supportive of this contention, defendant cites Danning v. Brunswick Corporation, 466 F.2d 1010 (9th Cir., 1972), cert. denied, 409 U.S. 1126, 93 S.Ct. 939, 35 L.Ed.2d 257 (1973). *Danning* was a consolidated suit by a trustee in bankruptcy and a shareholder of a competing bowling

center against Brunswick. Plaintiff alleged that Brunswick's assumption of the lease of the debtor violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act in that defendants "by their lease, conspired to foreclose acquistion of the [debtor] at the trustee's sale by anyone but Brunswick and enhanced Brunswick's monopoly in the bowling business." 466 F.2d at 1012 (footnote omitted).

In affirming the trial court's grant of summary judgment, the Ninth Circuit Court of Appeals stated:

> Plaintiffs' claims, as reflected in the complaints, are essentially similar; each is vested upon Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In substance the trustee and Levy contend that Malouf and Brunswick, by their lease, conspired to foreclose acquisition of the Matador business at the trustee's sale by anyone but Brunswick and enhanced Brunswick's monopoly in the bowling business.
>
> The basic defect in these contentions, briefly stated, lies in the fact that at the time of the sale the trustee had no business to sell. He had not seen fit nor taken the steps necessary to preserve the business as an integral unit, but had allowed the major components to revert to the creditor-owners.

466 F.2d at 1012 (footnotes omitted). Defendant asserts that the same reasoning applies to the instant case. This Court disagrees. The businesses which were sold in the instant case had been preserved as integral units. Mr. Lieblich testified at the trial that he and other bidders at the bankruptcy sale, assuming they had been successful, would simply have "assumed the debt obligations of [the bowling

centers involved] to Brunswick and have met them in the ordinary course of business." [Tr. 878-79]. Thus, it is clear from the testimony that the bidders at the bankruptcy sale in the instant case, unlike those in *Danning,* were purchasing going concerns which were in fact "engaged in commerce."

[10, 11] Defendant's next claim is that plaintiffs introduced no evidence whereby the jury could conclude that it acquired any assets of Belmont Lanes in Pueblo, Colorado or of Dutchess Lanes in Poughkeepsie, New York. Brunswick operated these centers under a lease agreement, defendant contends, and no other property was proven to have changed hands. The instant motion marks the first time that this issue has been raised and it might be plausibly argued that acquisition has been admitted.[1] Furthermore, the jury was instructed that they must find an acquisition in order to find a Section 7 violation; this they did. In this Court's view, that finding is supported by the record.

[1] Brunswick made the folowing statement regarding Dutchess Lanes at paragraph 23 of its answer:

> . . . defendant entered into possession of the premises of said bowling center pursuant to a lease thereof, and of certain personal property located therein, by the owner of such premises, and at the same time defendant purchased from LEMAR, INC. certain liquor and food supplies and ball boring equipment located on such premises.

Concerning Belmont Lanes, Brunswick stated at paragraph 19 of its answer that it entered into an agreement with the former operator on the condition that "said former operator would turn over to defendant certain other equipment and supplies located in said center." Brunswick also stated in a memorandum dated May 5, 1973 that "Brunswick also bought the assets comprising Belmont Lanes in Pueblo", and that "Brunswick also purchased the assets comprising Dutchess Lanes in Poughkeepsie" (Br. at 10).

An admission by counsel is binding upon his client. *See* Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972); Rhoades, Inc. v. United Air Lines, Inc., 340 F.2d 481, 484 (3d Cir. 1965).

Defendant's final argument on its motion for judgment notwithstanding verdict is that "evidence established as a matter of law that each of the [competing] corporations . . . was a failing company and that therefore any acquisitions of their assets or stock were beyond the reach of Section 7 of the Clayton Act." They argue that, because plaintiff's damage evidence was predicated on the fact that these centers would have gone out of business but for Brunswick's intervention, an admission has been made that the centers were in fact "failing companies". Much more is necessary however, for defendant's neat "Catch-22" proposition to be viable.

[12, 13] One asserting the failing company defense must establish not only that the particular company is in irreversible failure but also that the acquisition in question was the sole alternative available. United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555, 91 S.Ct. 1692, 29 L.Ed.2d 170 (1971). Whether the companies acquired by Brunswick were in fact failing is somewhat doubtful from the record. Furthermore, there is almost no proof as to the "sole alternative" requirement. A defense is a matter of proof for the defendant.

Brunswick also contends that it was the only bidder prepared to purchase all of the assets of AIBC and that that purchase was, therefore, the sole open alternative in order to save that corporation from failure as a matter of law. There were, however, several other bidders at the sale who were prepared to purchase individual establishments. There is no proof in the record, nor has Brunswick made any argument, as to why individual purchases would not present an additional alternative. Additionally, the jury re-

ceived sufficient instructions on the failing company defense [Tr. 4682-83; 4731-32] and found it inapplicable.

II

[14] Defendant's alternative motion is that a new trial should be granted. Such a motion is directed to the sound discretion of the trial court, Sotell v. Maritime Overseas, Inc., 474 F.2d 794, 796 (2nd Cir. 1973), and should only be granted where the verdict was influenced by partiality or prejudice, or some misconduct or some misconception of the law and the verdict established was therefore a clear instance of wrong decision and a resultant miscarriage of justice. Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179, 187 (8th Cir. 1972); Andrzejczak v. Calarco, 339 F.Supp. 68, 69 (W.D.Pa. 1972).

Several of the arguments marshalled in favor of the motion for a judgment notwithstanding verdict are restated in support of the motion for a new trial, this Court therefore considers its previous remarks sufficient to dispose of them. Included in this category are the following contentions: the Court erred in denying verdicts at the close of plaintiffs' case; the Court erred in denying defendant's motions for directed verdicts at the close of all the evidence; the verdicts are without foundation or support in the evidence; the verdicts are contrary to the manifest weight of the evidence.

[15] Defendant next argues that it was error for this Court to admit evidence illustrating the additional profits which would have been realized by the plaintiffs if the competing centers had not been acquired by Brunswick and had instead gone out of business. Defendant has cited no au-

thority, other than a cross-reference to a prior point, which would render such evidence inadmissible. Plaintiff correctly points out that an estimate of probable profits but for the alleged wrongdoing of a defendant is clearly admissible. William H. Rankin Co. v. Associated Bill Posters of the United States, 42 F.2d 152 (2nd Cir.), cert. denied, 282 U.S. 864, 51 S.Ct. 37, 75 L.Ed. 765 (1930). This being so, defendant's argument as to the admissibility of this evidence is reduced to a combination of a reargument of the viability of the plaintiffs' claims and a questioning of the evidence's weight. The Court has already decided the former and the latter is no ground for a new trial.

[16, 17] Defendant's next argument is that the Court's instruction that two of the acquisitions in question were, as a matter of law, "in a line of commerce" was error. Defendant asserts that such an instruction effectively took the issue of interstate commerce from the jury. Although this Court is convinced of the correctness of these charges, Washington State Bowling Proprietors Association, Inc. v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir.), cert. denied, 384 U.S. 963, 86 S.Ct. 1590, 16 L.Ed.2d 674 (1966); Bowl America, Inc. v. Fair Lanes, Inc., 299 F.Supp. 1080, 1090 (D. Md.1969), it is nevertheless arguable that they implied that the issue of *interstate* commerce was linked to the question of a line of commerce. It is textbook law, however, that a jury charge must be viewed in its entirety. James v. Continental Insurance Co., 424 F.2d 1064 (3d Cir. 1970); Ely v. Reading Co., 424 F.2d 758 (3d Cir. 1970). The jury in this case was specifically instructed as follows:

> Each of these plaintiffs, to be entitled to prevail on its claim under Section 7 of the Clayton Act, must prove each and all of the following facts:

First, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce. . . .

Any possible co fusion created by what was left unsaid was therefore eliminated by what was specifically stated.

[18] Defendant further contends that the Court's charges on what the jury might consider in deciding whether competition was lessened were erroneous as a matter of law. Specifically, Brunswick asserts that these charges were erroneous in that they (a) instructed the jury that they could consider the fact that "Brunswick describes itself as 'Number One in Bowling' and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers", (b) instructed the jury that they could conclude that competition had been lessened in the particular areas from the fact that Brunswick acquired more than an insubstantial percentage of the particular market areas involved.

Defendant argues that its corporate size and the fact that it is a manufacturer of bowling supplies are completely irrelevant to the case. This Court disagrees. Corporate size and status as a manufacturer are crucial to the question of whether competition was lessened. Defendant clings to the position that it should be considered as just another competitor in the retail bowling business. The law is to the contrary. Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); Reynolds Metals Co. v. F. T. C., 114 U.S.App.D.C. 2, 309 F.2d 223, 229-30 (1962); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966).

[19, 20] On the second point, it is admittedly true that occupation of a substantial portion of the acquired's market by the acquirer is not a per se antitrust violation. Transamerica Corp. v. Board of Governors, 206 F.2d 163, 170 (3d Cir. 1953), but a reasonable reading of the charge herein examined does not disclose such a suggestion. It is true, on the other hand, that the factors emphasized by the charge, and especially market percentage, are perhaps the most crucial considerations in Section 7 case. Brown Shoe Co. v. United States, *supra;* Sanitary Milk Products v. Bergjans, *supra;* United States v. Atlantic Richfield Co., 297 F.Supp. 1061 (S.D.N.Y.1969), aff'd sub nom., Bartlett v. United States, 401 U.S. 986, 91 S.Ct. 1233, 28 L.Ed.2d 527 (1971). The prerequisites for the granting of a motion for a new trial have not, therefore, been met by this contention.

[21] Defendant's last general objection relates to the Court's instructions as to damages. The initial specific argument, that plaintiffs could have suffered no damages because Brunswick could not, as a matter of law, have lessened competition by merely substituting itself for other bowling establishments, is merely the logical extension of the defendant's prior argument on the issue and has been sufficiently commented upon heretofore.

Defendant also claims that the Court erred in instructing the jury as to the monetary amounts of the damages claimed by the plaintiffs in that doing so had the effect of transforming opinion testimony into fact and directed the jury to find a specific amount.

[22, 23] Initially it should be noted that it is not error for the instructing Court to review the dollar amounts of

the damages proposed by both plaintiff and defendant. Dowell, Inc. v. Jowers, 166 F.2d 214 (5th Cir.), cert. denied, 334 U.S. 832, 68 S.Ct. 1346, 92 L.Ed. 1759 (1948); Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 900 (D.Mass.1954). Reviewing the dollar amounts proposed by both sides was, of course, an impossible task in this case since defendant produced no damage evidence whatsoever. Defendant complains that the review of dollar amounts precluded the jury from considering several mitigating factors as to damages which were brought out on cross-examination. The jury, however, was repeatedly instructed that they were the sole judges of the facts. It would be most presumptuous of this Court to assume that they ignored anything and the charge, viewed in its entirety, certainly did not instruct them to do so. It was admittedly difficult to maintain proper balance in the damages portion of the charge, but the source of the difficulty is obvious. Counsel choose the manner in which a case is to be tried, the court instructs on the law as it interprets it and the evidence adduced at the trial.

[24] Defendant's final argument is that the Court erred in instructing the jury as follows:

> If you find that Brunswick acquired one of these local bowling centers with such an effect, then you must assess damages with respect to that local market in the same way I have previously described in connection with monopolization and attempted monopolization.

The Court agrees and further finds that the jury's award of damages was excessive as a matter of law and must be either reduced or the matter retried to prevent a miscarriage of justice.

The plaintiff in question is Pueblo Bowl-O-Mat in Pueblo, Colorado. On the theory of reduced profits due to Brunswick's incursion, damages as to Pueblo were claimed by plaintiff as follows:

Additional Annual Bowling Revenues		Net Income Per $1,000 Bowling Revenues		Per Year	Number of Years	Damages
$ 90,000 to $100,000	×	$1,109	=	$ 99,810 to $110,900	8/1/63 to 4/1/73 (9⅔)	$ 964,830 to $1,072,030

These computations, however, were offered to show damages for monopolization and/or attempted monopolization upon which claim the jury found for the defendants. As matter of law, it was erroneous for the Court to instruct the jury to employ the same damage evidence with respect to the Section 7 claim because Brunswick did not acquire the competing establishment, Belmont Lanes, until April of 1965. Thus there could be no Section 7 damages for the 20 month period between August 1, 1963 and April 1, 1965, and the jury's award of $964,830 (the lower of the amounts claimed by plaintiffs) is erroneous.

Plaintiffs argue that the controlling proposition on this issue is whether there is any basis in the record for the finding which the jury actually made. In the normal situation, this would be a correct statement, but trial courts enjoy wide discretion in this area. Krall v. Crouch Brothers, Inc., 473 F.2d 717, 718-719 (8th Cir. 1973), and it would be naive of this Court to think that the jury, after being erroneously instructed, arrived at the correct Section 7 time period but coincidentally found damages in the exact dollar amount evidenced by the aforementioned incorrect time period. Thus, it is this Court's decision that plaintiffs either submit

to a remittitur on the damages of plaintiff Pueblo Bowl-O-Mat or retry the issue.

The one remaining question is the amount of the remittitur. Here too, quite predictably, there is disagreement. Defendant computes the remittitur as follows:

Jury Verdict Before Trebling		Number of Months 8/1/63 to 4/1/73	Per Month Damages		Number of Erroneous Months
$964,830	÷	116	= $8317.50	×	20 = $166,350 (corrected figure) × 3 (trebling) = $499,050

Plaintiff argues that this for[illegible] assumes too much. Specifically, they argue that it would be unwarranted for this Court to assume that if the jury had known that they could not assess damages for the period from August 1, 1963 to April 1, 1965, they would still have chosen the lower estimate of damages for the period from April 1, 1965 to April 1, 1973. They argue that the Court should employ the higher estimate for the 96 month period for which damages could correctly have been allotted and compute the remittitur as follows:

Plaintiffs' High Damages Estimate		Number of Months 8/1/63 to 4/1/73	Per Month Damages		Number of Correct Months
$1,072,030	÷	116	= $9,241.64	×	96 =

Amount Jury Could Have Found Based on Evidence	Difference Between What Jury Could Have Found and What They Did Find
$887,197 (corrected figure)	$964,830 — $887,197 = $77,633

$77,633 × 3 (trebling) = $232,899

To compute the remittitur otherwise, argue plaintiffs, would be an unwarranted attempt to decipher the jury's intent. Further, they cite Gorzalitz v. Olin Mathieson Chem-

ical Corp., 429 F.2d 1033, 1047 (5th Cir. 1970) for the proposition that the Court may not substitute its own judgment for that of the jury. That statement is a correct one but of little assistance on the instant issue since it really begs the question.

The present function of this Court is to exercise its discretion and equitably correct the mistake committed. In its opinion, it would be more of an invasion of the jury's function to say that they would have computed yearly losses differently if they were aware of the correct time period. The final award was, after all, merely a function of what the jury found to be yearly losses times the number of years involved. In view of the foregoing, then, it is this Court's opinion that the amount of the remittitur should be $499,050.00. Pueblo Bowl-O-Mat's award would then be $2,395,440.00. Therefore, unless plaintiff Pueblo Bowl-O-Mat submits to a remittitur of $499,050.00, defendant Brunswick's motion for a new trial as to the damages of that plaintiff will be granted. Defendant's motions in all other respects are hereby denied.

Submit appropriate Orders.

APPENDIX C

Opinion of the U.S. District Court for the District of New Jersey Dated November 15, 1974

Civ. A. No. 595-66.

United States District Court
D. New Jesrey.

Nov. 15, 1974.

As Amended Nov. 25, 1974.

TREADWAY COMPANIES, INC., *et al.*,

Plaintiffs,

—v.—

BRUNSWICK CORPORATION,

Defendant.

Cole, Geaney & Yamner, Paterson, N. J., for plaintiffs; Malcolm A. Hoffmann, Robert C. Agee, Robert W. Biggar, Jr., and Bernard Zucker, New York City, of counsel.

Stryker, Tams & Dill, by William L. Dill, Jr., Newark, N. J., for defendant; Miles G. Seeley, Thomas B. McNeill, and Mayer, Brown & Platt, Chicago, Ill., of counsel.

OPINION AND ORDER

WHIPPLE, Chief Judge.

The parties appear before this Court after having concluded a nine and a half week trial before a jury at which

the defendant Brunswick was found to have violated Section 7 of the Clayton Act, 15 U.S.C. § 18. The jury found no violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The plaintiffs were awarded damages by the jury in the amount of $2,358,030 before trebling and consented to a remittitur in the amount of $499,050 for the reasons set out in an opinion by this Court filed on September 17, 1973, Treadway Companies, Inc. v. Brunswick Corporation, 364 F.Supp. 316, 324-326 (D.N.J.1973). The relief presently sought by the plaintiffs is for an injunction pursuant to 15 U.S.C. § 16 and Fed.R.Civ.P. 65 ordering the defendant Brunswick to divest itself of Belmont Lanes, Pueblo, Colorado; Interstate Lanes, Ramsey, New Jersey; Fair Lawn Lanes, Fair Lawn, New Jersey; Ten-Pin-on-the-Mall, Paramus, New Jersey; and Lodi Lanes, Lodi, New Jersey.

In considering the propriety of this relief, the Court is mindful that the jury has already found injury and has awarded damages which, prior to Telex v. I. B. M., 367 F.Supp. 258 (N.D.Okl.1973), represented the largest outstanding, privately-litigated recovery under the antitrust laws of the United States. This Court is also reminded by the plaintiffs that, "[d]ivestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 330-331, 81 S.Ct. 1243, 1252, 6 L. Ed.2d 318 (1961).

[1] For its part the defendant resists this motion for injunctive relief. It contends that before this drastic remedy may be ordered, the Court must specifically find, pur-

suant to the requirements of Fed.R.Civ.P. 65, in what manner the defendant violated Section 7 of the Clayton Act and whether divestiture is, in fact, a remedy effectively directed toward ameliorating the injury found by the jury to have been suffered by the plaintiffs. The defendant further argues that the factual cause of plaintiffs' damages may not be found by the Court independent of and unassisted by the jury's finding on the record already submitted. At this stage of the proceeding, the Court is reminded by the defendant that it operates under the restraint of an estoppel by verdict wherein the Court's findings must at least be consistent with the jury's verdict if such findings were not analytically contained therein. Dixie Sand and Gravel Corp. v. Holland, 255 F.2d 304 (6th Cir. 1958). As a result the defendant vigorously emphasizes the fact that the jury found no liability on the Sherman Act charge of attempted monopolization. The defendant argues that this finding must necessarily influence the Court in its factual determination concerning the defendant's Clayton Act violation.

Section 7 of the Clayton Act reads:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or *to tend to create a monopoly.* 15 U.S.C. § 18 [emphasis supplied]

Since the jury previously found for the defendant on the Sherman Act charge of attempted monopolization, the defendant reasons that the italicized language above must now be removed from the Court's purview. Therefore, the defendant's violation of Section 7 must fall within the alternative language of the statute and reflect activities on its part which have resulted in a substantial lessening of competition. The defendant closes its argument by entreating the Court, as it makes its findings of fact pursuant to Fed.R.Civ.P. 65, to discover and reveal those specific acts of misconduct by which the defendant produced the substantial lessening of competition required by the statute.

[2-4] Although linguistically interesting and possessed of a certain persuasive allure, I conclude that the defendant's argument is legally deficient. It fails to recognize that the test for attempted monopolization under Section 2 of the Sherman Act involves, among other elements, the finding of a specific intent to monopolize. Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 73 S.Ct. 872, 97 L.Ed. 1277) 1953; Swift and Company v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1905). No such finding of specific intent, however, is a necessary element for a conviction under the "tendency to create a monopoly" provision of Section 7 of the Clayton Act. As a result, the jury's Sherman Act determination does not preclude this Court from finding that its Clayton Act verdict was based upon a "tendency to create a monopoly." United States v. DuPont de Nemours & Co., et al, 353 U.S. 586, 607, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957); Crown Zellerbach Corporation v. F.T.C., 296 F.2d 800, 825 (9 Cir. 1961), cert. denied, 370 U.S. 937, 82 S.Ct. 1581, 8 L.Ed.2d 807 (1962). It is also established, ". . . the

legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act." Brown Shoe Co. v. United States, 370 U.S. 294, 328-329, 82 S.Ct. 1502, 1526, 8 L.Ed.2d 510 (1962). The decision by the jury on defendant's alleged violation of the Sherman Act goes no further than what it appears to be on its facts and thus it bears no logical relationship to the Court's present task of making factual findings on the defendant's violation of Section 7 of the Clayton Act.

In making the present findings this Court places primary reliance on Reynolds Metals Company v. F.T.C., 114 U.S. App.D.C. 2, 309 F.2d 223 (1962) and the authorities cited therein. The *Reynolds* case is analogous to the case at bar. It concerned a vertical merger by Reynolds, the world's largest manufacturer of raw aluminum foil, with Arrow Brands, a converter of raw aluminum foil into decorated forms sold almost exclusively to the florist trade. The Court found:

> Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. The power of the "deep-pocket" or "rich parent" for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximately cost or below and thus to undercut and ravage the less affluent competition. The Commission is not required to establish that the Reynolds' acquisition of Arrow did in fact have anti-competitive consequences. It is sufficient if the Commission shows the acquisition had the capacity or potentiality to lessen competition. That such a potential emerged from the combination of Reynolds and Arrow was enough to bring it within Sec. 7. Reynolds Metal Company v. F.T.C., *supra*, 229-230 (1962).

Brunswick is a manufacturer of bowling equipment and its acquisition of these bowling lanes, which were potential and actual purchasers of its equipment, provided it with the opportunity of acting, like Reynolds, as a rich parent with a deep pocket. In Brunswick's case, however, the opportunity to tap the deep pocket did not prove merely to be a potentiality.

The history of the bowling industry and Brunswick's role in it is particularly illustrative on this point. Prior to Brunswick's entrance into the market of operating bowling centers, control of these businesses rested in the hands of single proprietors and a few small chains. One year after its entrance, however, Brunswick controlled 176 bowling centers in the United States and immediately became the industry's largest single operator controlling 5.5 times more centers than any of its competitors (Pl. Ex. 32)

Its growth in this area, however, did nothing to diminish its prominence as a major manufacturer of bowling equipment and, incident thereto, its position as a major creditor to the bowling centers which purchased its equipment. As a credit-extending parent it was able to subsidize the purchases of its newly-acquired business at the rate of $2,000.00 per lane, (Pl. Exs. 1, 1A, 2) while it placed the plaintiffs on a "cash only" basis although prior to entry in this market it customarily extended credit to these plaintiffs

(Pl.Ex. 35-38; Lieblich Tr. 598-601, 604-609, 617-628). Obviously the defendant utilized its position as a major supplier and creditor not only to nourish its own newly-acquired children but also to deprive its newly-found rivals.

This naturally jealous parent also sought to favor its newly-acquired businesses by endowing them with the allurements of give-away programs and special services as the Learn-to-Bowl series. The object was to attract and increase patronage of these bowling centers by individual bowlers and leagues. In this they were successful and drew patronage away from the plaintiffs. (Lieblich Tr. 290, 293-294, 321, 336-337, 389, 409-411, 873, 878-896, 899-901, 926-930; Kenny Tr. 1110-1111, 1126; Davis Tr. 1804-1812, 1818-1828, 1839-1843, 1869-1870; Mendelson Tr. 1243-1246, 1314, 1343-1346, Pl.Ex. 53). The deep pocket of the rich parent certainly contributed to the expenditures made on these programs.

It is obvious that the plaintiffs have suffered as a result of defendant's entry into the bowling center market. The jury also recognized the effect of this injury when it adopted plaintiffs' Exhibit 53 as its measure of damages on the Section 7 claims. This Court's own observations, coupled to the fact of the jury's own finding of injury on the Section 7 count, make it incumbent on me to fashion an equitable remedy to assure the nonrecurrence of such injury in the future. To act otherwise would have this Court violate the very doctrine of estoppel by verdict so vigorously advocated by the defendant both on oral argument and in its brief.

[5] In fashioning this remedy, I find it necessary to expressly state the factual basis on which I shall make my ruling. Although I have specifically made findings concerning the anti-competitive practices utilized by the defendant in causing the plaintiffs' injury, I also find in the alternative that the factual presence of the defendant in this market is sufficient to prompt the equitable intervention of this Court. In so finding, I adhere to the argument advanced by the plaintiffs that actual anticompetitive effects, let alone the causal mechanisms by which they were induced, are not necessary precedents to finding a violation of Clayton Section 7 nor to ordering equitable relief.

[6, 7] The mere presence of a defendant in the market with the capacity or potentiality to substantially lessen competition is sufficient to trigger a violation of Section 7. Reynolds Metals Co. v. F.T.C., *supra*, at 229-230. In the instant case, however, not only does this defendant possess the *potentiality* to substantially lessen competition (because of its dual capacity as a manufacturer, creditor and supplier of bowling equipment as well as a purchaser of the same) but also the jury has already found the *actuality* of this anti-competitive effect when it assessed its award of damages in favor of the plaintiffs. The very fact of the jury's finding, unless it was so erroneous as to demand a judgment n.o. v. which I have previously denied, is sufficient to support my present decision to order injunctive relief.

The sufficiency of the jury's finding to support an injunctive decree of divestiture does not automatically resolve all the issues presented in the plaintiff's present application. Although it is permissible for divestiture to be ordered in the instant case, the question remains concerning its wisdom. The cases indicate, at times, a judicial reluctance to order so drastic a remedy in a private antitrust action. Schrader v. National Screen Service Corp., 1955 Trade Case, Par. 68,217 (E.D.Pa.1955); and at times

the courts seriously question whether such a right is available to private litigants under the antitrust laws. American Comm'l Barge Line Co. v. Eastern Gas. Assoc., 204 F.Supp. 451 (S.D.Ohio 1962).

[8] This Court's reading of Section 16 of the Clayton Act, however, does not find any congressional reluctance nor prohibition of affording the remedy to a private litigant. The language of the more recent cases in this area also supports this interpretation of the statute. "In the absence of solid precedent or clear legislative history, this court's own research into the availability of divestiture and mandatory injunction to a private plaintiff suing under § 16 has impelled this court to conclude that both such equitable remedies are available to private plaintiffs under § 16." International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., 351 F.Supp. 1153. 1207 (D.Hawaii, 1972); Burkhead v. Phillips Petroleum Co., 308 F.Supp. 120, 127 (N.D.Cal. 1970). "The statute does not distinguish between types of injunctive relief. Any type would seem to be permissible, when it is appropriate. The . . . nature and extent of the remedy to be decreed . . . is a question for the trial court . . . " Julius M. Ames Co. v. Bostitch, Inc., 240 F.Supp. 521, 526 (S.D. N.Y., 1965).

[9] In ruling upon the appropriateness of the remedy the Court is influenced by a number of factors. Initially, it recognizes that private enforcement of the antitrust laws is encouraged both by Congress and the courts as an effective and efficient means of achieving governmental policy. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-131, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); Hecht Co. v. Bowles, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed.

754 (1944). A second but no less central factor is the need to restore competitiveness in the market as well as the actual need for relief by the plaintiffs. "Like restitution it merely deprive the defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128, 68 S.Ct. 947, 957, 92 L.Ed. 1245 (1948). Finally, as was previously observed at the outset of this opinion, it is a remedy which, " . . . is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." United States v. E. I. duPont de Nemours & Co., *supra*.

[10] As applied to the facts in the instant case, it is apparent that the defendant's position in the bowling industry both as a supplier purchaser and a creditor-borrower has infused it with the capacity to out-distance the efforts of its rivals because of the deep pocket of its manufacturing arm. Whether this deep pocket should or should not be utilized to finance give-aways and other promotional schemes or to subsidize or not to subsidize the purchase of newer and more attractive bowling equipment, it is clear that the opportunity for the abuse of this economic power is ever present. For the Court simply to enjoin these particular methods of doing busines would not prevent the defendant from possibly creating other means and practices by which the same anticompetitive effects could be produced in the market. In fact, it is this very anxiety about the versatility of an integrated giant and the multifarious ways by which it can abuse its econ-

omic power that has led this Court to refrain from basing its divestiture decree on narrow factual issues confined to those particular business practices that it has found to be anti-competitive in effect. The flexibility, afforded by the aggrandizement of economic power effected through the vertical merger in the instant case, is the actual danger that threatens both the bowling industry and these plaintiffs. This danger can effectively be removed only by rescinding the merger.

[11] Because the boundaries of this relief must be limited in extent to those zones of interest and actual harm properly represented by these plaintiffs, I shall order the defendant to divest itself of its bowling operations at Belmont Lanes, Pueblo, Colorado; Interstate Lanes, Ramsey, New Jersey; Fair Lawn Lanes, Fair Lawn, New Jersey; Ten-Pin-on-the-Mall, Paramus, New Jersey, and Lodi Lanes, Lodi, New Jersey.

The plaintiffs are to submit an appropriate order.

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-770

TREADWAY COMPANIES, INC., et al.,
Petitioners,

v.

BRUNSWICK CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX TO BRIEF.

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-770.

TREADWAY COMPANIES, INC., ET AL.,
Petitioners,

v.

BRUNSWICK CORPORATION,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

While the decision of the Court of Appeals for the Third Circuit presents important questions appropriate for review by this Court (see the petition for a writ of certiorari in **Brunswick Corporation v. Pueblo Bowl-O-Mat Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.**, October Term 1975, No. —), only one question can properly be raised by the petitioners herein, to wit:

Did the Court of Appeals for the Third Circuit err in ordering a new trial on the grounds that petitioners' claims that respondent had violated Section 7 of the Clayton Act and that petitioners had been injured as a result thereof, were submitted to the jury under erroneous instructions?

STATEMENT.

By their petition for a writ of certiorari, the plaintiffs in a private antitrust action seek review by this Court of the decision of the United States Court of Appeals for the Third Circuit reversing a treble-damage verdict and divestiture order in their favor and remanding the case to the district court for a new trial. Respondent agrees with petitioners that the decision below should be reviewed by this Court, but not on the questions which petitioners set forth in their petition and not for the reasons stated by petitioners.

Respondent submits that this Court should review the portion of the Third Circuit decision which holds that respondent was not entitled to judgment as a matter of law, to wit, the Third Circuit's determination (1) that the mere continued presence of certain local bowling centers allegedly "acquired" [1] by respondent in violation of Section 7 of the Clayton Act, 15 U. S. C. § 18, could afford a basis for petitioners to recover money damages under Section 4 of the Clayton Act, 15 U. S. C. § 15, even though there was no proof that the "acquisitions" resulted in any lessening of competition or monopoly, (2) that petitioners could maintain their damage action even though their entire damage case was based on the premise that, had it not been for respondent's "acquisitions", the "acquired" bowling centers would have gone out of business, and (3) that petitioners should be given a second chance to demonstrate that the "acquired" companies were "engaged in commerce" within the meaning of Section 7 of the Clayton Act. In **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.** (October Term 1975, No. —), respondent sets forth what it believes to be the reasons why this Court should grant a

1. See footnote 5 *infra*.

writ of certiorari and respondent respectfully directs the Court's attention to that petition.

Insofar as consideration of the instant petition is concerned, respondent believes it important that the Court should be provided with a more complete exposition of the history of the case than appears in the cryptic summary set forth in the petition.

This lawsuit came about as a direct result of the erratic fortunes of the recreational bowling industry. With the introduction of automated equipment in the mid 1950's, the industry flourished and new bowling establishments sprang up all over the country. During this growth period, respondent (at that time one of the two major American manufacturers of bowling equipment) sold large quantities of automatic pinsetters and bowling lanes to operators of local bowling centers.[2] This equipment required a substantial capital investment and respondent financed the sale of this equipment on extended secured credit terms (866a-868a, 1563a-1573a).

In the early 1960's, the industry went into a sharp decline and respondent experienced a nightmare of collection problems. Defaults on equipment payments by bowling center operators became commonplace and numerous operators were in such hopeless financial straits that it became clear there was no reasonable prospect of payment. Exercising its chattel security rights, respondent made numerous repossessions and attempted to dispose of the repossessed equipment at discount prices. Even at these discount prices, sales of the repossessed equipment could not keep pace with the repossessions. This placed respondent in a very precarious financial position. Over the

2. Since 1963, there have been very few sales of new bowling equipment due to the availability of large quantities of used equipment (1574a-1575a, 2666a).

Record references herein are to the appendix in the court of appeals.

years, respondent had borrowed large sums of money to finance the manufacture and sale of bowling equipment. The wherewithal to repay this indebtedness was to come from payments by bowling center operators on the equipment which respondent had sold to them on credit. By the end of 1964, respondent owed close to $300 million on its borrowings. At the same time, its receivables were in excess of $400 million, of which more than $100 million was over ninety days delinquent. Respondent's warehouses were filled with repossessed equipment. In an effort to reverse its deteriorating financial condition, respondent decided that, in those cases in which attempts to collect receivables from bowling center operators failed, respondent would repossess its bowling equipment and attempt to sell the equipment in place to third parties. If no sale could be effected, respondent would consider operating the failing center itself if there appeared to be a reasonable prospect that a positive cash flow would result (1573a-1592a, 2112a-2124a, 2142a-2144a, 2156a-2161a, 2684a).

In January 1965, respondent formed a Bowling Center Operations Division which was charged with the duty of evaluating bowling centers whose equipment respondent would repossess and operating those centers which respondent would take over. Between 1965 and 1972, respondent evaluated over 600 hopelessly delinquent centers and took over the operation of 222 of them. Respondent disposed of 11 of these 222 centers to third parties and closed 43 of them which were unable to develop a positive cash flow. The highest number of bowling centers operated by respondent at any one time under this program was 169 (1610a, 1616a-1623a, 1677a-1680a, 2681a).[3]

The bulk of respondent's bowling center operations began in 1965, the year that respondent created its Bowling

3. In 1972, there were a total of 8,818 bowling centers in the United States of which respondent operated 168 (1672a-1673a), less than 2% of the total.

Center Operations Division. In that year, respondent commenced operating 124 bowling centers (1617a, 2681a). Three of the areas in which respondent began operating bowling centers in 1965 were Poughkeepsie, New York; Pueblo, Colorado; and Paramus, New Jersey. Petitioners operated bowling centers competitive to the ones "acquired" by respondent in those three areas (203a, 264a, 296a-297a, 329a-333a, 389a-392a, 692a, 1646a, 1988a).[4]

Claiming that respondent's taking over and continuing the operation of bowling centers violated Section 2 of the Sherman Act ("monopolization" and "attempt to monopolize") and Section 7 of the Clayton Act ("acquisitions" whose effect "may be substantially to lessen competition, or to tend to create a monopoly"), petitioners brought suit against respondent seeking money damages (under Section 4 of the Clayton Act) and equitable relief (under Section 16 of the Clayton Act). There ensued a lengthy jury trial in the United States District Court for the District of New Jersey.

There was no evidence at the trial that competition among bowling centers in the Poughkeepsie, Pueblo and Paramus areas was lessened in any degree (let alone "substantially") by reason of respondent's taking over or operating any bowling center, nor was there any showing that any of the centers achieved a greater share of the local bowling patronage after respondent began operating it

4. The bowling centers operated by petitioners were Holiday Bowl-O-Mat (near Poughkeepsie, New York), Pueblo Bowl-O-Mat (in Pueblo, Colorado) and Paramus Bowl-O-Mat (in Paramus, New Jersey). Each of the operators of these bowling centers is a subsidiary of Treadway Companies, Inc. which, through its subsidiaries, operates bowling centers throughout the United States (109a-112a).

than the center had under its prior operator. Throughout the trial, petitioners took the position that respondent had violated the law in taking over the centers and keeping them in business, that each of the petitioners (as a competitor of one of the centers) was "injured" by the mere continued presence in the market of the center operated by respondent and that, therefore, petitioners were entitled to recover as "damages" the difference between what their bowling centers actually earned and what those centers would have earned had the "acquired" [5] centers failed and disappeared from the market (551a-552a, 566a, 580a-583a, 595a-610a, 673a, 785a, 889a-890a, 899a-900a).

The trial judge denied respondent's motions for directed verdicts (5a) and submitted the case to the jury on

5. It is not at all clear that respondent had "acquired" any of these centers within the meaning of Section 7 of the Clayton Act. Respondent entered two of the three markets involved in this case (Poughkeepsie and Pueblo) not by purchasing the stock or assets of an existing business enterprise but by exercising its rights as a secured creditor—repossessing, after continuous defaults, assets in which it had an existing security interest. There is nothing in the legislative history of Section 7 of the Clayton Act which suggests that the section was intended to cover a secured creditor's exercise of its right to recover equipment upon default in equipment payments by the debtor.

Respondent entered the third market (Paramus) by purchasing at a bankruptcy sale the capital stock of two bowling centers which also had defaulted in equipment payments. The legislative history of the 1950 amendments to Section 7 of the Clayton Act demonstrates that Section 7 does not apply to purchases made at bankruptcy sales. See H. R. Rep. No. 1191, 81st Cong., 1st Sess. at p. 6 (1949):

> "The argument that a corporation in bankruptcy or failing condition might not be allowed to sell to a competitor has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases."

See also S. Rep. No. 1775, 81st Cong., 2d Sess. at p. 7 (1950) to the same effect.

petitioners' liability and damage theories. After instructing the jury generally with regard to charges of violation of Section 2 of the Sherman Act, 15 U. S. C. § 2 (2257a-2266a), and Section 7 of the Clayton Act, 15 U. S. C. § 18 (2267a-2273a), the trial judge gave the jury specific directions as to how it should apply Section 7 to the case before it. He charged (2317a-2318a):

> "The Section 7 charge applies only to the local markets of Pueblo, Poughkeepsie and Paramus. I ask you, therefore, to direct your attention to those markets.
>
> "The undisputed evidence shows that Brunswick acquired Belmont Lanes in April 1965. As a matter of law this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Pueblo, Colorado, metropolitan area.
>
> "If Brunswick's acquisition of Belmont Lanes substantially lessened competition, then Brunswick violated Section 7 by acquiring Belmont Lanes. You may consider that Brunswick describes itself as 'Number One in Bowling' and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers. Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Pueblo area beyond an insubstantial amount, say beyond 10 to 15%, may be sufficient for you to conclude that competition has substantially been lessened. Consequently, you properly

may conclude that Brunswick by the acquisition of Belmont Lanes violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained allegedly more than 20% of the Pueblo, Colorado, bowling center market."

Virtually identical instructions were given respecting the Poughkeepsie and Paramus markets (2319a-2321a).

On the question of damages, the trial judge first gave a general instruction (2322a-2326a), and then said (2326a-2327a):

> "Plaintiffs' witnesses [naming them] all were qualified as expert witnesses. They were entitled to give their opinion as to profits which the plaintiff bowling centers would have made but for defendant's violations of law. These witnesses estimated the amount of business which would have come to plaintiffs' bowling centers if Brunswick had not operated a competitive center or had permitted it to close down in the normal course. Their opinion varied to some extent and the range of damages reflected by the opinions is reflected on Plaintiffs' Exhibit 53 in evidence.
>
> "Although there was some differences in amount, these witnesses mutually corroborated each other both in the methods used in determining damages and in general estimates as to the extent of damages. I instruct you that if you believe any of [plaintiffs' witnesses] was telling the truth, then you must believe that all were telling the truth since they mutually corroborated each other and since there was no contradictory evidence offered by Brunswick as to extent of damages, except that the defendant denies that the plaintiffs are entitled to any damages.

> "With regard to plaintiffs' Request #120, I will charge: You may disregard this testimony as to damages only if you find all these witnesses [naming them] were discredited or impeached by contradictory evidence. I instruct you that if you find that the anti-trust laws have been violated and that plaintiffs' corporations have been injured thereby, then you must also find damages in the amounts falling within the range as indicated by the testimony and exhibits. . . ."

After setting forth the range of damages estimated by petitioners' witnesses in connection with the claims of monopolization and attempt to monopolize (2328a-2331a), the trial judge charged the jury (2331a-2332a):

> "If you do not find that Brunswick either monopolized the national market or monopolized any of the local markets or attempted to monopolize any of the local markets, you may still assess damages if you find that Brunswick violated Section 7 of the Clayton Act.
>
> "Brunswick violated Section 7 of that Act if you find that its acquisition of any of [the specific bowling centers] had the effect of substantially lessening competition or of tending to create a monopoly.
>
> "Or if you find that Brunswick did monopolize or attempt to monopolize some of the local markets but not all, then if any of the local markets I have just named were not among them, you must still consider them under Section 7. You must assess damages

if you find that Brunswick acquired one of those last named local markets with the effect of substantially lessening competition or tending to create a monopoly.

"If you find that Brunswick acquired one of these local bowling centers with such an effect, then you must assess damages with respect to that local market in the same way I have previously described in connection with monopolization and attempted monopolization."

The trial judge instructed the jury to return separate verdicts as to each plaintiff and as to each claim (2352a-2354a).

The verdicts returned by the jury (2384a-2385a) found **for** * respondent on the claims of monopolization and attempted monopolization under Section 2 of the Sherman Act, but **against** respondent on the claims under Section 7 of the Clayton Act. The jury awarded as damages the exact amounts of the lowest estimates by petitioners' witnesses of the additional revenues and profits that petitioners' bowling centers would have earned over the years if the "acquired" centers had failed and gone out of existence on the day respondent commenced operating them (2549a).

Subsequent to the jury verdict and the denial of respondent's post-trial motions (Pet. App. 33a-49a), the trial judge issued an opinion on the question of equitable relief (Pet. App. 50a-60a). Relying upon the jury determination that respondent had violated Section 7 of the Clayton Act, the trial judge directed respondent to divest itself of the bowling centers in Poughkeepsie, Pueblo and Paramus.

The Court of Appeals for the Third Circuit reversed and remanded for a new trial (Pet. App. 1a-23a). The Court of Appeals held that petitioners had adduced sufficient evidence to get their Section 7 case to the jury, notwithstanding the fact (established by the jury's Section 2 verdict) that respondent had neither monopolized nor attempted to monopolize the business of operating bowling centers (either nationally or in the three local markets) and notwithstanding the absence of any showing that respondent's activities in these three markets had resulted in any lessening of competition. According to the Court of Appeals, "a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover **damages under § 4 if it shows injury in fact causally related** to the violator's presence in the market, **whether or not that injury flows from or results in an actual lessening of competition**" (Pet. App. 19a).

* Wherever boldface is used in this brief, the emphasis is ours.

Although it held for petitioners (erroneously, respondent submits) on this basic legal proposition, the Court of Appeals concluded that the case had to go back for a new trial on both liability and damages because neither aspect of the case had been properly submitted to the jury. On the question of whether there had been a violation of Section 7 of the Clayton Act, the Court of Appeals held that the trial judge's charge "was virtually a directed verdict" against respondent (Pet. App. 21a). "Without highlighting other factors, [the charge] emphasized the market share held by Brunswick in each of the markets in question, after the acquisitions" (Pet. App. 21a). "The charge was defective in a number of ways. It did not say, for example, that the jury must consider such factors as the relative financial strength of Brunswick, Treadway, and other competitors. . . . Nor did the charge say that the jury must find that Brunswick's position as an equipment manufacturer or equipment financier gave it any retail market advantage. . . . The jury also was not asked to

take into account the historical tendency in the industry toward concentration or lack of such a tendency" (Pet. App. 21a-22a). "By emphasizing the quantitative substantiality of the market shares held by Brunswick, to the exclusion of other factors, the court failed to draw the jury's attention to the indicators of qualitative substantiality referred to in *Brown Shoe Co. v. United States, supra, Reynolds Metals Co. v. FTC, supra,* and *FTC v. Procter & Gamble Co., supra*" (Pet. App. 22a) the three cases which the Court of Appeals had earlier cited as the basis for its holding that petitioners had adduced sufficient evidence to get the jury on the question whether respondent's "acquisitions" violated Section 7 (Pet. App. 11a-14a).[6] "While the quantitative substantiality of the market shares is important in a case involving a merger of horizontal competitors, it is far less important here because Brunswick was not previously in any of the three markets. Brunswick's entry into the picture did not increase concentration, but only acted as a substitution of competitors" (Pet. App. 22a).

The Court of Appeals also found error in the trial judge's instruction on damages. In the first place, said the Court of Appeals, "the thrust of this instruction, indeed the thrust of plaintiffs' § 4 theory, was that damages were to be computed by first assuming that each Brunswick-acquired center would have closed down at the moment of the takeover, but for the takeover and then by projecting what portion of the closed center's business would have been captured by Treadway's centers. However, since plaintiffs' § 7 theory was based on the presence of the violator, Brunswick, in the market, the jury should have been determining what plaintiffs' profits would have been if the violations had *never* occurred. In other words, the jury should have first been instructed to find whether the acquired centers would, in fact, have gone out of business, rather than being taken over by someone else or continuing in business by extensions of credit. Such a finding was a prerequisite to establishing any proximate causal relationship between the § 7 violation and the only evidence of injury to business or property which was presented" (Pet. App. 25a-26a). But the jury was never instructed that it had to make such a finding before it could award damages. "The effect of the damage charge was to relieve [petitioners] of [the] burden [of proving an injury to their property or business proximately related to the alleged Section 7 violation] and permit the jury to award damages on a theory which assumed an essential fact on which no finding was made" (Pet. App. 26a). Moreover, the instruction to the jury that, if it found a violation of the antitrust laws, it had to "find damages in the amounts falling within the range as indicated by the testimony and exhibits" (2327a) "was error, for it is clear that a trier of fact is at liberty within the bounds of reason to reject in whole or in part the uncontradicted testimony of a witness which does not convince the trier of its merit. This rule applies on the issue of damages as on any factual issue" (Pet. App. 27a).

Finally, the Court of Appeals reversed the trial court's order granting equitable relief, saying that "it is clear that an essential predicate for the [equitable relief] decision was that the jury verdict established Brunswick's unlawful presence in the market" and "with clear indications of the court's reliance on the jury's verdict, a verdict which we have concluded is tainted by erroneous legal instructions, we think that § 16 relief must also be reconsidered after a new trial" (Pet. App. 28a). The Court of Appeals then

6. **Brown Shoe Co. v. United States,** 370 U. S. 294 (1962); **Reynolds Metals Co. v. FTC,** 309 F. 2d 223 (D. C. Cir. 1962); **FTC v. Procter & Gamble,** 386 U. S. 568 (1967).

went on to say that, since the trial court might eventually again be asked to issue a divestiture order in this case, it would set forth its views on the appropriateness of that remedy. Reviewing the case law and the legislative history analyzed by the Court of Appeals for the Ninth Circuit in **International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.**, 518 F. 2d 913 (9th Cir. 1975), the Third Circuit questioned the validity of the Ninth Circuit's conclusion that divestiture is not a remedy available to a private plaintiff under Section 16 of the Clayton Act but found it unnecessary in this case to "decide a rule of general application with respect to the availability of divestiture relief under § 16. Even if such a private remedy is available, it would in our view be inappropriate because less drastic relief will provide sufficient redress" (Pet. App. 30a).[7]

7. The Court of Appeals continued (Pet. App. 30a-31a):

"It must be recalled that we are dealing with three separate geographic markets, and thus with three separate problems of relief. The focus of the remedy, then, must be on what can be accomplished to overcome the threat to competition in those specific markets. If the suit had been commenced at a time when the court might have prevented the acquisitions by Brunswick or any other deep pocket owner, and if it had done so, one of two things might have happened. Brunswick might have allowed the bowling centers to close, and would thereby have eliminated any § 4 injury to plaintiffs' property or business. Alternatively, Brunswick might have found another purchaser whose presence in the market would have retained the same level of competition. The injury to Treadway's property or business at least on this record would have been the same, but there would have been no § 7 violation on which to predicate either a § 4 or a § 16 action. At this late stage, ten years after the acquisition, divestiture of going, thriving bowling centers to other purchasers will not change the competitive picture. By now the formerly threatened businesses have survived.

"An alternative to a sale, of course, would be to dismantle the centers. But at this time such a procedure would merely reduce competition artificially in the three markets to the

7. (Cont'd.)

detriment of the public. If this had been a merger between competitors so that its effect would almost inevitably have been anticompetitive, divestiture, if authorized, might have been appropriate. But where the § 7 violation is by a new entrant purchasing an existing competitor in an existing market, relief should be restricted to preventing those practices by which a deep pocket market entrant harms competition. Otherwise what is intended as a shield for smaller competitors becomes a sword against the consumer. Given the type of § 7 violation which plaintiffs alleged and attempted to prove, divestiture was simply inappropriate."

ARGUMENT.

I.

The Court of Appeals' Action in Setting Aside the Verdict Because of Improper Jury Instructions Does Not Present Any Issue Warranting Review by This Court.

It is true, as petitioners state, that the decision of the Court of Appeals in this case has "far-reaching ramifications" (Pet. 10). But these ramifications do not stem from the decision to set aside the jury verdict in petitioners' favor. Rather, they stem from the finding by the Court of Appeals that respondent was not entitled to judgment as a matter of law. The point to which the Court of Appeals was referring when it spoke of "far-reaching ramifications" (Pet. App. 19a) was its holding that "a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition" (Pet. App. 19a). It is this holding and the other holdings by the Court of Appeals **in petitioner's favor** which present the significant issues in this case and the issues upon which this Court should grant a writ of certiorari. See respondent's petition for certiorari in **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.** (October Term 1975, No. —). The holding by the Court of Appeals that the jury verdict in petitioners' favor should be set aside because of improper instructions does not present any issue calling for review by this Court. That holding turns upon the precise facts of the case and the language of the instructions below, and is not of general importance.

Throughout Point I of their Argument (Pet. 10-15), petitioners totally ignore the Court of Appeals' holding that "the § 7 charge was inappropriate to the only theory upon which a § 7 violation could in the circumstances of this case be predicated" (Pet. App. 23a). Thus, for example, petitioners' state that "despite its abstract endorsement of the propositions that respondent Brunswick violated Section 7 of the Clayton Act and that such violation was legally compensable under Section 4 of that Act, the court of appeals mandated a new full-scale jury trial for the determination of already established facts" (Pet. 12). This is not so. The Court of Appeals did not hold that respondent had violated Section 7 or that petitioners had sustained legally compensable damages. What it held was that petitioners had adduced sufficient evidence to get their case to the jury under proper instructions—instructions that the Court of Appeals found were absent here. There are no "already established facts" in this case showing either a violation or compensable injury. The Court of Appeals held that the requisite factual determinations had to be made by a properly-instructed jury.

Similarly erroneous is petitioners' statement that "the court of appeals recognized that the mere presence of respondent as a competitor in its customers' markets was illegal" (Pet. 13). The Court of Appeals "recognized" no such thing. All it "recognized" was that "in some industries the acquisition of a competitor by a deep pocket parent can have sufficient potential to harm horizontal competitors so as to violate § 7" and that "there was sufficient evidence of such potential here to submit the case to the jury on the issue of effect on competitors" (Pet. App. 14a). But what the Court of Appeals also "recognized" was that this issue had not been properly submitted to the jury (Pet. App. 20a-23a).

Petitioners also ignore the fact that the jury instruction on damages was improper even if one were to accept the propositions (1) that petitioners were entitled to recover for "injuries" resulting from respondent's mere continued presence in the market and (2) that the compensable "damages" could consist of the additional income petitioners' bowling centers would have obtained had the "acquired" centers failed and gone out of existence.[8] The trial judge had instructed the jury in unequivocal terms that, if it found that respondent had violated the antitrust laws, it had to award damages falling within the range shown in the testimony and exhibits introduced by petitioners (2327a). This was plainly improper. None of the damage witnesses was disinterested. All were officers or employees of petitioners. The proof of damages which they submitted was based on numerous assumptions, any one or all of which were in the province of the jury to reject. The fallacies in the damage estimates by these witnesses were demonstrated during extensive cross-examination. Certainly, the jury had the right, as does every jury, to find the witnesses unreliable and to reject their testimony. "The credibility of the witnesses in showing damages is for the jury." **Hobart Brothers Company v. Malcolm T. Gilliland, Inc.**, 471 F. 2d 894, 903 (5th Cir.), *cert. denied* 412 U. S. 923 (1973). The jury is "not bound nor concluded by the opinion testimony of any witness, expert or otherwise." *Ibid.* The jury can reject a plaintiff's damage evidence even where the defendant presents no evidence on damages. **Cape Cod Food Products v. National Cranberry Ass'n.**, 119 F. Supp. 900, 916 (D. Mass. 1954).

8. Respondent, of course, strenuously disagrees with both of these propositions. See the petition for certiorari in **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.** (October Term, 1975, No. —).

When the trial judge instructed the jury that, if it found a violation of the antitrust laws and injury to petitioners, it "must also find damages in the amounts falling within the range as indicated by the testimony and exhibits" (2327a), he clearly impinged upon the jury's right to determine all issues of fact including the credibility of witnesses and the correctness of the assumptions on which they based their testimony. Since the jury awarded damages to petitioners in the exact amount set forth as the "lower range" of damages in petitioners' damage exhibits (2549a), it is obvious that the jury was following the trial judge's instructions scrupulously and went as low as it could without violating those instructions. Even if the charge were otherwise impeccable (which it was not), the Court of Appeals had no choice but to set aside the verdict.

It is clear that the Court of Appeals' action in setting aside the verdict because of improper jury instructions does not present any issue of general importance warranting review by this Court.

II.

The Question Whether the Remedy of Divestiture Is Available to Private Antitrust Plaintiffs Is Not an Issue Upon Which Certiorari Should Be Granted in This Case.

The question to which petitioners address the Court's attention in Point II of their Argument is not an issue upon which certiorari should be granted in this case. Whether the remedy of divestiture is generally available to private plaintiffs under Section 16 of the Clayton Act,[9] is not an issue that is properly presented here in view of the manner

9. Section 16 of the Clayton Act, 15 U. S. C. § 26, gives a private plaintiff the right "to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . ."

in which the Court of Appeals dealt with the divestiture issue in this case.

In the first place, the question of equitable relief in the instant case is not ripe for review. The Court of Appeals set aside the equitable relief order not because it held that divestiture is not an available remedy in private antitrust cases but because "an essential predicate for the decision [granting equitable relief] was that the jury verdict established Brunswick's unlawful presence in the market" and "with clear indications of the court's reliance on the jury's verdict, a verdict which we have concluded is tainted by erroneous legal instructions, we think the § 16 relief must also be reconsidered after a new trial" (Pet. App. 28a). The ensuing discussion in the Court of Appeals' opinion on the question of the availability of divestiture as a remedy was solely for the purpose of providing guidance to the trial court if and when the question of equitable relief would again arise. Thus, in the context of this case, the question is premature.

Secondly, in providing guidance to the trial court in this case, the Court of Appeals stated expressly that it was not laying down "a rule of general application with respect to the availability of divestiture relief under § 16" (Pet. App. 30a). Rather, it held that, "even if such a private remedy is available" (Pet. App. 30a), "divestiture was simply inappropriate" here (Pet. App. 31a) for the reasons stated *supra*, p. 15. These reasons relate only to the facts of this case and are not of general applicability.

Furthermore, even assuming *arguendo* that the issue is properly presented in this case, the fact is that, notwithstanding petitioners' assertions, there is no "widespread conflict among the circuits on the important issue of whether or not private antitrust plaintiffs have standing to receive a divestiture order" (Pet. 16). With the exception

of the instant case (wherein the Court of Appeals for the Third Circuit specifically declined to decide the issue), there are only two court of appeals decisions which actually have dealt with the question and they both reach the conclusion that divestiture is not an available remedy for private antitrust plaintiffs. See **Continental Securities Co. v. Michigan Cent. R. Co.,** 16 F. 2d 378, 379-380 (6th Cir. 1926), *cert. denied* 274 U. S. 741 (1927), and **International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.,** 518 F. 2d 913, 920-926 (9th Cir. 1975).[10] This ruling is consistent with the legislative history, which shows that the House committee which proposed Section 16 of the Clayton Act intended that divestiture not be available as a remedy to private plaintiffs.[11] From the time of enactment of the Clayton Act through 1962, the court uniformly took the position that divestiture is not an available remedy under Section 16 since that Section speaks only of preventative relief, *i.e.*, "injunctive relief . . . against threatened loss or damage" and does not empower private parties to ask a court to undo completed transactions.[12]

10. Petitioners cite (Pet. 16) **American Crystal Sugar Co. v. Cuban-American Sugar Co.,** 259 F. 2d 524 (2d Cir. 1958) and **Credit Bureau Reports, Inc. v. Retail Credit Co.,** 358 F. Supp. 780 (S. D. Tex. 1971), *aff'd* 476 F. 2d 989 (5th Cir. 1973), and imply that the courts of appeals for the Second and Fifth Circuits have ruled that divestiture is an available remedy (Pet. 18). Neither of these courts has so ruled. The **American Crystal Sugar** case does not discuss the question and the **Credit Bureau** ruling was a district court decision which the Court of Appeals affirmed on other grounds.

11. The legislative history is set forth in the Ninth Circuit's opinion in the **International Tel. & Tel.** case, 518 F. 2d at 921-924.

12. In addition to the Sixth Circuit decision in the **Continental Securities** case cited in text, see **Venner v. Pennsylvania Steel Co.,** 250 Fed. 292, 296 (D. N. J. 1918); **Graves v. Cambria Steel Co.,** 298 Fed. 761, 762 (S. D. N. Y. 1924) (Learned Hand, J.); **Fein v. Security Banknote Co.,** 157 F. Supp. 146, 148 (S. D. N. Y. 1957); **American Commercial Barge Line Co. v. Eastern Gas & Fuel Ass'n.,** 204 F. Supp. 451, 453 (S. D. Ohio 1962).

It is true that, beginning in 1964, a number of district courts have stated that the remedy of divestiture may be an appropriate form of relief under Section 16 of the Clayton Act. These were mainly district courts in the Ninth Circuit,[13] and their decisions have been effectively overruled by the recent **International Tel. & Tel.** decision of the Court of Appeals for the Ninth Circuit.[14] There have been only three private cases in which divestiture actually has been ordered [15] and in all three the divestiture orders have been set aside, the Third Circuit having done so in the instant case and the Ninth Circuit having done so in the other two cases.[16]

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13. The district court decisions in the Ninth Circuit are **Bailey's Bakery, Ltd. v. Continental Baking Co.,** 235 F. Supp. 705, 717 (D. Hawaii 1964), *aff'd per curiam* 401 F. 2d 182 (9th Cir. 1968), *cert. denied* 393 U. S. 1086 (1969) (dictum); **Burkhead v. Phillips Petroleum Co.,** 308 F. Supp. 120, 127 (N. D. Cal. 1970); **Bay Guardian Co. v. Chronicle Publishing Co.,** 340 F. Supp. 76, 81-82 (N. D. Cal. 1972); **Calnetics Corp. v. Volkswagen of America, Inc.,** 348 F. Supp. 606, 616 (C. D. Cal. 1972) and 353 F. Supp. 1219 (C. D. Cal. 1973); **International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.,** 351 F. Supp. 1153, 1203-1210 (D. Hawaii 1972), *rev'd* 518 F. 2d 913 (9th Cir. 1975). *Compare* **McKeon Construction v. McClatchy Newspapers,** 1970 Trade Cases ¶ 73,212 at p. 88,817 (N. D. Cal. 1969), where the court declined to determine the question on a motion to dismiss.

14. The only other decisions of which we are aware which state that divestiture is an available private remedy are **Julius M. Ames Co. v. Bostitch, Inc.,** 240 F. Supp. 521, 526 (S. D. N. Y. 1965) (denying motion to dismiss a Section 7 claim); **Credit Bureau Reports, Inc. v. Retail Credit Co.,** 358 F. Supp. 780, 797-798 (S. D. Texas 1971), *aff'd on other grounds* 476 F. 2d 989 (5th Cir. 1973) (finding divestiture to be inappropriate under the facts of the case); and **Fuchs Sugars & Syrups, Inc. v. Amstar Corp.,** 1975-2 Trade Cases ¶ 60,568 (S. D. N. Y. 1975) (denying motion to dismiss a Section 7 claim).

15. **Calnetics** and **International Tel. & Tel.** are the only cases other than the instant one in which divestiture was actually ordered. See 11 Von Kalinowski, **Antitrust Laws and Trade Regulation** § 81.10[1] (1973).

16. The Ninth Circuit's opinion in the **International Tel. & Tel.** case reversed the divestiture orders in both **International Tel. & Tel.** and **Calnetics.** See 518 F. 2d at 921 n. 34.

Thus, there is no direct conflict in the circuits and, in any event, the question whether the remedy of divestiture is available to private antitrust plaintiffs is not properly presented in this case.

III.

Petitioners Have No Basis for Objecting to the Court of Appeals' Ruling on the "Engaged in Commerce" Question.

Under Point III of their Argument, petitioners seek to create the impression that the Court of Appeals ordered a new trial on the "engaged in commerce" question "solely because [**United States v. American Building Maintenance Industries,** 422 U. S. 271 (1975)] was decided after the trial of this matter" (Pet. 24). Nothing could be further from the truth. What happened was that respondent asked the Court of Appeals to hold that respondent was entitled to judgment as a matter of law, *inter alia,* on the ground that there was no evidence in the record which could support a finding that the "acquired" companies were corporations engaged in interstate commerce and that, therefore, petitioners had failed to satisfy the jurisdictional predicate for an action under Section 7 of the Clayton Act.[17] While the instant case was pending in the Court of Appeals, this Court handed down its decision in **the American Building Maintenance** case, stating, *inter alia,* that "the phrase 'engaged in commerce' as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce" (*id,* at 283) and that "to be engaged 'in commerce' within the meaning of § 7, a corporation must itself be directly engaged in the production, distribution,

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17. Section 7 of the Clayton Act comes into play only when a "corporation engaged in commerce . . . acquire[s], directly or indirectly, the whole or any part of the stock or . . . assets of another corporation engaged also in commerce."

or acquisition of goods or services in interstate commerce." *Ibid.* Respondent argued that the record in this case did not satisfy an "engaged in commerce" test since the record clearly demonstrated that respondent's predecessor operators of the bowling centers in Poughkeepsie, Pueblo and Paramus were engaged solely in the operation of local bowling centers. The Court of Appeals was at least inclined to agree with this, saying (Pet. App. 15a-16a):

> ". . . had the district court granted a motion to dismiss at the close of the plaintiffs' case, on the ground that the new § 7 threshold had not been met, we might have been inclined to affirm that decision."

But the Court of Appeals did not order a dismissal of the case on this ground saying, instead (Pet. App. 16a):

> "There was, however, some evidence in the record to suggest that at least some of the acquired bowling centers may have made purchases of pins, pinsetter parts and perhaps other supplies, directly from Brunswick, rather than from local distributors. Thus, they arguably were engaged 'in the flow of interstate commerce' within the meaning of the new § 7 test. We think it would be unjust, given the intervening change in the law, to find that the evidence presented was insufficient to cross the jurisdictional threshold and thus order that the district court dismiss the case. We think it more appropriate, consistent with the way in which we will ultimately dispose of the case, to have the 'in commerce' question relitigated, with the plaintiffs' being given an opportunity to satisfy the new and more stringent jurisdictional test."

Thus, far from depriving petitioners of anything, the Court of Appeals (improperly, respondent believes) gave

petitioners a second chance—a chance to supply missing evidence. What more do petitioners want? The Court of Appeals' only alternative to ordering a new trial was to order the case dismissed.

Petitioners argue that the "engaged in commerce" question was decided in their favor by the jury acting under proper instructions (Pet. 24). Even if that were true, it would afford no basis for this Court to set aside the order directing a new trial. The basic reason that the Court of Appeals remanded the case for a new trial was not because of the "engaged in commerce" aspects of the case, but because the jury had been instructed improperly on both liability and damages.

Furthermore, the assertion that the "engaged in commerce" question was decided in petitioners' favor by a properly instructed jury is incorrect. While the trial judge gave lip service in his charge to the proposition that Section 7 requires a showing that the acquisition is from a corporation engaged in interstate commerce,[18] he never explained to the jury what had to be found before a conclusion of "engaged in [interstate] commerce" could be reached. The trial judge improperly said nothing about interstate commerce when he told the jury that "there are

18.

"As I previously instructed you, Section 7 of the Clayton Act provides that no corporation engaged in commerce shall acquire the whole or any part of the assets of another corporation also engaged in commerce where in any 'line of commerce' in any 'section of the country' the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly" (2268a).

"Each of these plaintiffs, to be entitled to prevail on its claim under Section 7 of the Clayton Act, must prove each and all of the following facts:

"First, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce. . . ." (2342a).

three elements involved in determining whether defendant violated Section 7 of the Clayton Act." [19] Moreover, he completely took away the "commerce" element from the jury when he turned to the actual application of the law to the facts. For example, the trial judge instructed the jury as to respondent's "acquisition" in Pueblo, Colorado (2317a):

> "The undisputed evidence shows that Brunswick acquired Belmont Lanes in April 1965. As a matter of law this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Pueblo, Colorado, metropolitan area."

And he went on to instruct merely (2317a):

> "If Brunswick's acquisition of Belmont Lanes substantially lessened competition, then Brunswick violated Section 7 by acquiring Belmont Lanes. . . ."

Similar instructions were given with respect to respondent's "acquisitions" in Poughkeepsie (2319a) and Paramus (2320a). By these instructions, the trial judge effectively told the jury that it need not concern itself with the threshold Section 7 requirement that each of the challenged "acquisitions" be from a corporation engaged in interstate commerce.

19.

"There are three elements involved in determining whether defendant violated Section 7 of the Clayton Act:

"One, determination of the relevant line or lines of commerce—the product market. The term 'product market' includes a service market as well as a product market in which the parties compete;

"Two, determination of the relevant section of the country, the geographic market;

"And three, determination of the likely anticompetitive effects of the acquisition of bowling centers in the relevant local market" (2268a).

That the trial judge removed this element from the jury's consideration was made starkly clear by the events that took place after the jury had retired for its deliberations. The jury sent a note to the trial judge expressly requesting, among other things: "Please clarify . . . Section 7 of the Clayton Act . . ." (2357a-2358a). The trial judge handed counsel the response he intended to give to the jury, which purported to be a paraphrase of Section 7. This again omitted any reference to the requirement that the corporation whose stock or assets had been "acquired" was "engaged in commerce" (2366a). Counsel for respondent objected, pointing out that this was an incorrect statement of Section 7, and urged the trial judge to include in his response to the jury the words "engaged in commerce" and the fact that this means "engaged in interstate commerce" (2370a-2371a). Counsel for petitioners countered by objecting to the inclusion of these words—even though they expressly appear in Section 7—on the ground that "to put it in here it seems to me is to invite the jury to labor over what is meant by being in commerce" (2376a) and "I think that the commerce aspect of it is just a red herring, and it shouldn't be pulled in here" (2377a). Over respondent's objection, the trial judge accepted the argument of petitioners' counsel and completely eliminated all reference to the critical "in commerce" element in "clarifying" Section 7 at this most crucial time (2381a). It is clear that it was not the jury, but the trial judge, who really decided the "engaged in commerce" issue in petitioners' favor.

Thus, although respondents present a "commerce" issue appropriate for review by this Court (see petition for certiorari in **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.**, October Term 1975, No. —), petitioners herein do not.

IV.

The Court of Appeals Did Not Interfere With the Prerogatives of the Jury.

In Point IV of their Argument (Pet. 27-32), petitioners claim that the Court of Appeals interfered with the prerogatives of the jury. This simply is not so. It was the trial court, not the Court of Appeals, that interfered with the jury's prerogatives in this case. In the first place, as we have just noted, the trial judge effectively decided the threshold "engaged in commerce" question in petitioners' favor as a matter of law and did not leave any room for the jury to decide this jurisdictional question in respondent's favor.

Secondly, on the question of liability the trial judge repeatedly instructed the jury that the important thing to look at was market share:

> "[T]he primary index of legality is the market share of the acquired and acquiring companies and the extent of concentration in the industry" (2269a).

> "[H]igh market shares and significant increases in concentration may be sufficient in itself to establish a violation of Section 7" (2270a).

> "I charge you that any percentage of the market achieved by Brunswick in the Pueblo area beyond an insubstantial amount, say beyond 10 to 15%, may be sufficient for you to conclude that competition has substantially been lessened. Consequently, you properly may conclude that Brunswick by the acquisition of [a specific bowling center in Pueblo, Colorado] violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained allegedly more than 20% of the Pueblo, Colorado, bowling center market" (2317a-2318a).

> "[Y]ou may properly conclude that Brunswick by the acquisition of [a specific bowling center in Poughkeepsie, New York] violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained more than 20 per cent of the Poughkeepsie, New York bowling center market" (2319a-2320a).

> "[Y]ou may properly conclude that Brunswick by the acquisition of [specific bowling centers in the Paramus, New Jersey area] violated Section 7 of the Clayton Act because Brunswick through those acquisitions obtained allegedly 39 per cent of the Paramus, New Jersey, bowling center market" (2321a).

As the Court of Appeals noted: "This charge, in the context of the acquisition of retail outlets in relatively small geographic markets, was virtually a directed verdict" (Pet. App. 21a). "By emphasizing the quantitative substantiality of the market shares held by Brunswick, to the exclusion of other factors" (Pet. App. 22a), the trial judge did not permit the jury to perform its time-honored role as the finder of fact.

The trial judge's interference with the jury appears once again in the portion of the charge relating to the question of damages. There, as we have noted at pp. 18-19, *supra,* the trial judge instructed the jury that it "must" award damages within the range claimed in petitioners' testimony and exhibits. This instruction, which even petitioners concede was "a limited directed verdict" (Pet. 30), was a plain infringement of the jury's prerogatives. The jury did not have to find damages within the range submitted by petitioners. Each juror had the right to disbelieve petitioners' witnesses and reject their damage estimates whether or not "contradictory or impeaching

evidence was offered" (Pet. 32). Each juror had the right to find that petitioners had sustained no damages or that their damage claims were extravagant. The trial judge took these prerogatives away from the jury when he insisted that once it found liability the jury was required to award damages within the range claimed by petitioners.

It was the trial judge, not the Court of Appeals, who interfered with the jury's prerogatives and petitioners do not present any issue appropriate for review by this Court.

CONCLUSION.

For the foregoing reasons, the instant petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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